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ON

FOREIGN JURISDICTION

AND THE

EXTRADITION OF CRIMINALS.

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BY THE

RIGHT HON. SIR GEORGE CORNEWALL LEWIS,
BART. M.P.

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PREFACE.

THE Author thinks it right to state, in laying the following pages before the Public, that the collection of materials for this inquiry was commenced by him some months ago ; that the manuscript was in the Printer's hands before the recent change of Administration ; and that he is exclusively responsible for the contents of this Publication, both as to facts and opinions.

June, 1859.

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EXTRADITION OF CRIMINALS.

ALTHOUGH man is a social animal, and although by a metaphor all men are said to be brothers, yet the entire human race never has formed, and never can form, one political community. Men are divided into numerous societies, in each of which some person, or body of persons, is sovereign, and each of which has its own peculiar territory. Now, the essence of political sovereignty is, that it is legally omnipotent within its own territory, but that it is legally powerless within the territory of another State. Within the one, its action is subject to no legal question; within the other, its action is armed with no legal authority.

Such are the strict limits of national sovereignty, equally recognised by the peculiar legal system of every State, and by the principles of international jurisprudence. In contemplation of law, each State is a little world of its own; it claims no legal power upon foreign territory; it acknowledges no legal right of any other State upon its own territory. But since man is a social as well as a political animal; and since he is impelled by various wants, desires, and sympathies, to communicate with the citizens of other States, and to establish relations with foreigners resident out of his own national territory, the strict rule of exclusive sovereignty has, from an early period of civilization, been infringed in different ways;

arrangements have been devised by which the law of one State has, to a certain extent, recognised the laws of other States; and attempts have been made, by different contrivances, to mitigate the inconveniences arising from the strict observance of the rule of exclusive national sovereignty, without abandoning it as a paramount theoretical principle.

It is unnecessary to enter upon a formal enumeration of the causes which give rise to intercourse between the citizens of different States, and which induce them to establish relations of interest or friendship, more or less permanent, with one another. The variety in the products, natural and artificial, of different countries, and the consequent operations of trade; the desire of information and amusement; the connexions of literature and science, and other cognate motives, prevent the legal isolation of nations from bearing all its practical fruits, and break down the barriers which the doctrine of political sovereignty might, if literally interpreted, establish between independent communities.

From the early time when the Latin word *hostis* signified both an alien and an enemy, there has been a constant tendency, in the progress of civilization, to soften the distinction between natives and foreigners, to mitigate the harsh consequences flowing from the strict doctrine of exclusive territorial sovereignty, to treat with respect the interests, the institutions, and the customs of foreign States, and to consider aliens as sharing, for practical purposes, in the attributes of a common humanity. All the principal civilized States are reciprocally bound by treaty engagements, regulating many important interests of their subjects; and they all agree in the theoretical recognition of a body of rules of international law, laid down by modern text-writers of authority, to which they show a considerable, though irregular, deference, in their practical conduct.*

The inconveniences springing from a rigorous adherence

to the doctrine of exclusive national sovereignty, have however been aggravated, in a remarkable degree, by the concurrence of several phenomena of our modern civilization. In the first place, we cannot fail to observe that, of late years, the spread of education, the increased habit of learning foreign languages, and the diffusion of literature, have generalized and strengthened the desire of foreign travel. The almost uninterrupted continuance of peace in Europe and North America since the settlement of 1815, has likewise promoted industry and manufactures, and has given a vast impulse to the commercial intercourse of different nations. Now, whether the desire of foreign travel be for curiosity and amusement, for intellectual improvement, or for mercantile business, its satisfaction is enormously promoted by the economical arrangements and mechanical inventions for facilitating communication which have recently arisen, as well as by the excellent police and internal security of modern States. The improvement of roads and bridges, the multiplication of commodious inns, but, above all, the general introduction of steam navigation and of steam railways, have produced a complete revolution in travelling—so greatly have they diminished its difficulty, fatigue, expense, delays, and uncertainty. The convenience of obtaining money through foreign bankers in every part of the civilized world, and the universal establishment of a cheap letter post and of the electric telegraph, which enables a person at a distance to keep up frequent communications with his home, have added to the facilities of foreign travel. The operation of these, and of other subsidiary causes, which will occur to the mind of the reader, and which need not therefore be pursued in detail, annually increases the intercourse between the citizens of different States, and renders their relations less dependent upon the arbitrary boundaries of territorial sovereignty. The Great Exhibition of 1851 for the Industry of all Nations, and the striking success which attended that vast and original

enterprise, may be taken at once as an example and a result of the ideas which have grown up under this new state of things.

When every day exhibits more clearly this conflict between law and fact, between theory and practice; when the strict doctrine of jurisprudence teaches that between the resident citizens of two independent States there are no more legal relations than between the inhabitants of two different planets; and when, notwithstanding this theoretical consequence of the principle of sovereignty, thousands of Europeans belonging to different States are constantly acting as if they were, for purposes of jurisdiction, members of the same political community; it is natural that attempts should be made to systematize the practice which has grown up under the recognised exceptions to the pure territorial principle, and to extend, by fixed international agreements, the cosmopolitan arrangements which circumstances have so largely favoured. The extent to which the law of one country recognises the law of another country in the jurisdiction of its civil tribunals, has been of late years treated by Burge in his *Commentaries on Colonial and Foreign Laws*; by Story, the American jurist, in his celebrated work on the *Conflict of Laws*; and by subsequent writers, both Continental and English, as a separate department of the law of nations, under the denomination of 'Private International Law.'* This is a purely legal subject, and therefore requires a professional treatment; but the principles upon which the criminal law shall be withdrawn from the strict operation

* The best work is that of Fœlix, *Traité du Droit International Privé*, Paris, 1847, ed. 2. The treatise of Mr. Westlake, *On Private International Law* (London, 1858), contains a useful collection and classification of the decisions of the English courts. The subject has likewise been treated by Mr. Reddie, in his *Inquiries on International Law, Public and Private* (Edinburgh, 1851). A fourth volume of Dr. Phillimore's *Commentaries*, on the same subject, is promised, but has not yet appeared.

of the rule of territorial sovereignty involve matters of more general import. The latter question has been of late years discussed by both German and French writers;* but although they have brought much learning and ability to bear upon the argument, there is a wide discrepancy of opinion in their results. In the proper solution of this problem, England, owing to her extensive trade, and her multiplied relations with foreign States, is at least as much interested as any other country. Events of recent occurrence have likewise shown that opinions on this subject are not less divided here than on the Continent. I propose, therefore, with the assistance to be derived from the discussions of the late continental writers, to investigate the principles which, in the present social and political state of Europe and America, ought to determine the territorial limits of criminal jurisdiction, principally with reference to the law of England.

Wheaton, expressing the admitted rule, lays it down that the supreme and exclusive power of civil and criminal jurisdiction is an essential attribute of an independent State.† 'The common law,' says Story, 'considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed.'‡ Fœlix in his *Traité du Droit International Privé*, reduces

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* See Mohl, *Revision der völkerrechtlichen Lehre vom Asyle*, in the *Zeitschrift für die gesammte Staatswissenschaft*. 1853, *pp*. 461—604; and *Geschichte der Staatswissenschaften*. 1855, vol. i. p. 451.

Berner, *Wirkungskreis des Strafgesetzes nach Zeit, Raum, und Personen*. Berlin, 1853.

Bulmerincq, *Das Asylrecht, und die Auslieferung flüchtiger Verbrecher*. Dorpat, 1853.

Blüntschli, *Deutsches Staats-Wörterbuch*, Art. *Asylrecht*, *Auslieferung*, and *Auslieferung von politischen Verbrechern*. 1857.

Villefort, *Des Crimes et des Délits commis à l'Etranger, et de la Nécessité d'une Réforme à ce Sujet dans la Législation Française*. Paris, 1855.

† *Elements of International Law*, vol. i. p. 136. Compare Vatel, b. 2, § 84.

‡ *Conflict of Laws*, p. 874, ed. 2.

the doctrine on this subject to the following propositions: 1. Each nation possesses and exercises, solely and exclusively, the sovereignty and jurisdiction in the whole extent of its territory. 2. No State can by its laws directly affect or regulate things which are out of its territory; nor can any State affect and bind persons who are not resident within its territory, whether they are its subjects by birth or not.*

Such is the general rule of territorial sovereignty. We have now to inquire how far this rule undergoes modifications in its application.

All persons being locally within the territory of any State, are subject to the operation of its laws and to the jurisdiction of its tribunals, with the exception of certain privileged classes of persons, whose exemption has received the name of exterritoriality. These are; 1. Foreign sovereigns. 2. Foreign ambassadors. 3. Foreign troops. 4. Foreign ships of war. A foreign ambassador is considered to be subject to the criminal law of his own country, though resident in the territory of the State to which he is accredited. The exterritorial privilege does not extend to consuls. Troops passing through a foreign territory, or stationed in it, are subject to their own discipline, and amenable to the law military of their own country.† In like manner public ships entering a foreign port retain their peculiar jurisdiction, and are exempt from the territorial law with respect to all acts done by their crew on

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* § 9, 10. The received doctrines on the subject of territorial jurisdiction are likewise clearly stated by Ortolan, *Règles Internationales de la Mer*, tom. i. p. 289—292, ed. 2. 1853. The cardinal rule is laid down in the dictum of Paulus, that a judge who outsteps his territorial jurisdiction is disobeyed with impunity: 'Extra territorium jus dicenti impune non paretur.'—*Dig.* 2, 1, 20.

† See Vatel, b. 4, c. 7, 8, 9; Wheaton, vol. i. p. 150; Fœlix, §§ 209—222, 576; Berner, *Wirkungskreis des Strafgesetzes*, p. 206—216; Blackstone, vol. i. p. 253-6; vol. iv. p. 70; 2 Phillimore *Com.* p. 190.

board.* These exemptions require mention, but they are of little practical importance in the present state of the civilized world.

" A question has been raised, whether persons abiding temporarily in a country can be properly punished for the crime of high treason; but no good reason can be shown for drawing a distinction in this respect between natives and foreigners. If a foreigner were exempt from the penalties of treason, he might be employed by natives as an agent for executing designs which they were afraid to attempt.†

With the exceptions which have been pointed out, the rule that the criminal jurisdiction of a State extends over all persons who are within its territory with respect to acts done within the territory, is of universal application. Criminal jurisdiction, however, is not confined within these limits. It is sometimes exercised on account of acts done without the territory over persons both within and without the territory. The different varieties of exterritorial jurisdiction for criminal offences may, as it appears, be reduced to the following five heads:—

1. Jurisdiction for offences committed in national ships on the high seas.

2. Mixed jurisdiction, under treaty, for offences committed in foreign ships on the high seas.

3. Jurisdiction for piratical offences on the high seas.

4. Jurisdiction by permanent local tribunals, under treaty or by sufferance, in Mahometan or barbarous countries, for offences committed in those countries.

5. Jurisdiction by the ordinary home tribunals, not under treaty, for offences committed by native subjects on the territory of foreign States, both civilized and uncivilized.

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* Ortolan, vol. i. pp. 215, 227-8, 298; Berner, 171; 1 Phill. *Com.* p. 366.

† See Berner, *ib.* p. 82-6.

Each of these classes of exterritorial jurisdiction rests on peculiar grounds, and will therefore require a separate examination.

1. The first head is, of offences committed in national ships on the high seas. The open sea, except so far as it is commanded from the land, is exterritorial. It is the domain of no State, and is merely a highway,* along which the ships of all nations are entitled to pass, with only such exclusive rights as are implied in the limited purpose for which they use it.† In this state of things, the rule which has been established by common acquiescence, under the obvious dictates of utility, is for each State to exercise a criminal jurisdiction over the ships of its own nation; the nationality of a ship being proved by certain recognised facts, and being denoted by the flag. In Government ships of the national navy, the law is of a military character; in mercantile and other private ships, it is the ordinary criminal law.

The ground of this rule is commonly expressed, for the sake of brevity, in the form of a legal fiction; namely, by saying that a ship is a moveable part of the territory of the State whose national flag it bears.

Dropping all metaphor, we may say that a ship is a floating structure, the inmates of which, so long as it remains on the high seas, and is therefore within no national territory, are considered as subject to the sovereignty of the State indicated by its flag.‡

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* The Homeric expression, *ὑγρὰ κέλευθα*, exactly designates the legal character of the sea.

† It is unnecessary here to enter into the question of the limited appropriation of the sea for purposes of fishery. See Vatel, b. 1. § 287; Ortolan, tom. i. p. 172.

‡ See Ortolan, tom. i. pp. 212, 243. Hence children born in a ship on the high seas are natural-born subjects of the State to which the ship belongs, Ortolan, *ib.* p. 222. Ortolan, *ib.* p. 179, and 1 Phill. *Com.* 216, lay it down that every ship is bound to have a national character. The nationality of a merchant vessel depends upon—1. The construction or origin of the vessel. 2. The owners to whom it

The exercise of criminal jurisdiction by each nation over its own ships on the high seas is a principle universally admitted. Its application only gives rise to dispute in respect to the means used for verifying the nationality of the flag under which a ship sails; the visitation and search necessary for this purpose being only justifiable where a ground of suspicion exists.* The jurisdiction of a State with respect to crimes committed on the high sea in ships bearing its flag is exclusive, and is not shared by any other nation.†

A limited exterritoriality is sometimes allowed to merchant vessels in foreign ports; namely, in cases where different members of the same crew commit offences against one another on board the vessel.‡ In this case, a merchant vessel within the territorial water-limit of another State may be permitted to retain the independent jurisdiction which it possessed on the high seas, on account of its separateness and its internal organization for purposes of discipline; but this does not appear to be the rule of English law.

2. The second head is the mixed jurisdiction, under treaty, for offences committed by foreign ships on the high seas.

By Act of Parliament, the trading in slaves by sea is made a punishable offence for English ships, and any person who contravenes this provision may be tried in an English court.§ But England has likewise entered into

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belongs. 3. The captain and officers who command it; and 4. The crew. (Ortolan, *ib.* p. 180.) The nationality of a ship of war is proved by its flag and the pendant which it hoists at its peak and at the top of its masts; by the attestation of its commanding officer, given in case of necessity upon his word of honour; by the commission of the commanding officer, and by the orders which he has received from his sovereign. (Ortolan, *ib.* 208.)

* See Wheaton, vol. i. p. 153

† Ortolan, tom. i. p. 295. ‡ Ortolan, *ib.*, p. 229, 302, 450.

§ *The Consolidated Slave-trade Abolition Act*, 5 Geo. 4, c. 113 (1824), makes dealing in slaves on the high seas an offence punishable as piracy (§ 9).

treaties with foreign Powers for the reciprocal enforcement of this prohibition; so that English ships of war can visit and capture ships of those Powers which carry on the slave-trade. This right of seizure is created by treaty, which derogates from the general rule of international law; it is limited to the ships of the contracting Powers; it does not imply the assumption of a general police of the seas, and is not inconsistent with the recognised principles of maritime exterritoriality. Under some of the treaties, the captures so made are adjudicated by courts of mixed commission, comprised of commissioners representing both nations. Under others they are adjudicated by national tribunals. The treaties with Spain and Portugal are examples of the first class; those with Denmark, Sardinia, Austria, Prussia, and Russia, are examples of the second class.* By a clause in the Ashburton Treaty with the United States (Aug. 9, 1842, art. 8) each Power engages to maintain a squadron on the coast of Africa, to enforce separately the laws, rights, and obligations of the two countries for the suppression of the slave-trade; but there is no mutual right of search and capture between England and the United States. The Slave-trade Treaty between Great Britain and France, made the 29th of May, 1845, for ten years, has expired, and has not been renewed. The rights of search and capture at sea with respect to foreign ships carrying on the slave-trade, can hardly be considered a species of foreign jurisdiction. It is only where the treaty authorizes the creation of a mixed court for the adjudication of the captures of both nations, that a foreign jurisdiction can properly be said to exist.

3. The third head is jurisdiction for piratical offences on the high seas.

When a ship, without letters of marque legitimately

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* See 1 Phill. *Com.*, 331; *Hertslet's Slave-trade Treaties*, 8vo, 1844; *Report on Slave-trade Treaties, House of Commons*, August 12, 1853.

obtained, or due authority to act as a privateer, makes war upon other ships upon the high seas, or upon land from ships, and practises a system of forcible plunder, it forfeits its national character, under whatever flag it may sail, and becomes a pirate. A pirate is regarded by all nations as a general enemy; he is said to be a 'hostis humani generis,' and piracy to be a 'delictum contra genus humanum.' As the open sea is not the territory of any one nation, it is not competent to any one nation to preserve order or remove delinquents on its surface, as it is in the ports, rivers, and lakes of a State.* The ship of any nation may therefore lawfully attack and capture a pirate, and may bring it into a port of its country; and the captain and crew might be tried for the crime of piracy in the courts of that country. It is the exterritorial character of the open sea, the consequent absence of all specific obligation of any nation to repress piracy, and the general right of all nations to take part in its prevention, that has led to the maxim of a pirate being an enemy of mankind, and not the peculiar malignity of the offence. As a pirate may be a foreigner, piracy differs from other crimes in this circumstance, that a subject of another realm, who owes, even for a time, no obedience to our laws, is subject to their operation.† He is subject to the laws of every State by the

* In one of the conferences at the Congress of Vienna, Lord Castlereagh adverted to *the police* to be exercised over ships carrying slaves north of the equator. 'Le Prince de Talleyrand ayant prié lord Castlereagh de déterminer le sens précis de cette dernière expression, celui-ci repondit qu'il entendait par cette police, celle que tout gouvernement exerçait en vertu de sa propre souveraineté, ou de ses traités particuliers avec d'autres puissances. Le Prince de Talleyrand et le Comte de Palmella déclarèrent qu'ils n'admettaient en fait de *police maritime*, que celle que chaque puissance exerçait sur ses propres bâtimens."—*Flassan, Hist. du Congrès de Vienne*, vol. i. 275.

† See 3 *Chitty on Crimes*, 1091. The defendant is entitled to an acquittal, unless the piracy is proved to have been committed on the high seas, *ib.* 1093 (*a*). As to piracy committed on land from ships, see 1 Kent *Com.* 185.

necessity of the case; for if he were not subject to the laws of all States, he would be subject to the laws of none; and if he were not subject to the laws of any State, he could not be punished by any judicial process.*

These remarks apply to piracy strictly so called. Certain acts, however, committed in British vessels (for example, the slave-trade) have been made by statute constructive piracy, and the offenders are punishable as pirates in our courts; but they could not be treated as pirates by other nations.†

4. The fourth head is jurisdiction by permanent local tribunals, under treaty, or by sufferance, in Mahometan or barbarous countries, for offences committed in those countries.

One form of this jurisdiction, which has existed from the earliest times, is that of factories, established for commercial purposes by a more civilized in the territory of a less civilized nation, with the consent of the latter. Factories have always been allowed to appoint magistrates of their own, and to exercise an independent jurisdiction, from the Greek factory of Naucratis in ancient Egypt, and the factories of the Genoese and Venetians in the Levant, in the middle ages,‡ to those of the English East India Company in Hindostan.§

The consular jurisdiction now exercised under British authority, in the Ottoman Empire and China, over offences committed on the spot by British subjects, is of the same nature. The Act of 6 and 7 Vic. c. 94 (1843) after reciting that 'by treaty, capitulation, grant, usage, and suf-

* See 1 Ortolan, 232; 1 Wheaton, 153; 1 Phill. *Com.* 379.

† See 4 Blackstone's *Com.* 72.

‡ These factories in the Levant were called *scale* by the Italians, and *échelles* by the French. *Scala* first signified a landing-place, and afterwards a port: see Ducange, in *voc.* Volney, *Voyage en Syrie et en Egypte*, tom ii. p. 393, derives *scala*, as thus used, from the Arabic *kalla*, which signifies a place for receiving vessels, a roadstead; but the Latin origin is evidently the true one.

§ Auber's *Constitution of the East India Company*, p. 228.

ferance, and other lawful means, her Majesty hath power and jurisdiction within divers countries and places out of her Majesty's dominions,' and that 'doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed,' proceeds to enact that 'it shall be lawful for her Majesty to hold, exercise and enjoy any power or jurisdiction which her Majesty now hath or may at any time hereafter have within any country or place out of her Majesty's dominions, in the same and as ample a manner as if her Majesty had acquired such power or jurisdiction by the cession or conquest of territory.' It declares that all acts done in pursuance of such jurisdiction in any country or place out of the Queen's dominions, shall, in all courts within the Queen's dominions, be as valid and effectual as if they had been done according to the local law then in force within such country or place. The Act further contains powers to send persons charged with crimes in such a country to a British colony, as well as offenders sentenced to death or imprisonment. Under this Act, Orders in Council have been issued, creating a consular jurisdiction with respect to offences committed by British subjects in the Ottoman Empire, in the Empire of China, in the Kingdom of Siam, and in the dominions of the Sultan of Morocco. The consular jurisdiction in Turkey has received a more regular and definite form by the creation of a judge of the Supreme Consular Court at Constantinople, under the Order in Council of 27th August, 1857.

The nature and extent of this jurisdiction with respect to the Ottoman Empire is clearly explained in the following passages extracted from the instructions of the Foreign Office to the consular servants in the Levant; which are applicable to the other countries in which a similar jurisdiction is exercised.

The right of British consular officers to exercise any juris-

diction in Turkey in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the Sultans of Turkey to the British Crown, and therefore the right is strictly limited to the terms in which the concession is made.

The right depends, in the next place, on the extent to which the Queen, in the exercise of the powers vested in her Majesty by Act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects, and therefore the Orders in Council which may from time to time be issued, are the only warrants for the proceedings of the consuls, and exhibit the rules to which they must scrupulously adhere.

This state of things in Turkey is an exception to the system universally observed among Christian nations. But the Ottoman Emperors having waived in favour of Christian Powers rights inherent in territorial sovereignty, such Christian Powers, in taking advantage of this concession, are bound to provide as far as possible against any injurious effects resulting from it to the territorial Sovereign; and as the maintenance of order and the repression and punishment of crime are objects of the greatest importance in every civilized community, it is obligatory upon the Christian Powers, standing as they do in Turkey in so far as their own subjects are concerned, in the place of the territorial Sovereign, to provide as far as possible for these great ends.*

Under this system a British subject resident in the country is in some criminal cases withdrawn from the jurisdiction of the native tribunals, and is either punished by the sentence of a consular court, or is remitted to a British colony for trial and punishment; in other criminal cases he is subject to the concurrent jurisdiction of the British authority and a Turkish judge. A similar jurisdiction is exercised by the other chief Christian Powers in the Ottoman Empire, as well as in other Oriental and African countries.†

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* Tuson, *British Consul's Manual*, p. 145.

† See 1 Wheaton, p. 156; 1 Phil. *Com.* 362; 2 *Com.* 271; Ortolan, pp. 317—323; Tuson, *British Consul's Manual*, 122.

The unwillingness of European residents in an Oriental country to submit to the jurisdiction of the native tribunals, and the sense of insecurity which that liability engenders, has given rise to two expedients for withdrawing them from its operation:—1. Commercial factories. 2. Exempt consular jurisdiction. Recourse has been had to the latter system when the number of European residents was too large, and their objects too various, to admit of their concentration within the narrow precincts of a single factory. The privileged consular jurisdiction produces the desired effect of insuring the Europeans against the dangers of a barbarous criminal and civil tribunal; but the advantages of an exemption from the natural system of territorial jurisdiction can only be purchased at the price of much countervailing evil. All foreign criminal jurisdiction, even that exercised by a civilized on the soil of an uncivilized nation, is a feeble and defective instrument, and the tendency of the privileged European jurisdiction in the Turkish Empire is stated, in general, to be the impunity of the European criminal.*

Another example of jurisdiction under the Foreign Jurisdiction Act is that exercised on the Gold Coast of Africa. Criminal and civil justice is here administered not only upon British subjects, but also upon natives, by an officer, acting under the authority of the Secretary of State for the Colonies, entitled a Judicial Assessor, who sits principally at Cape Coast Castle. The Royal warrant of 17th December, 1847, which first constituted this officer, recites that 'We have, by usage and sufferance, or by

* See Senior's *Journal in Turkey and Greece* (1859), p. 45, 72, 74, 88, 130, 209. One of the interlocutors remarks that 'those who enjoy the capitulations can scarcely be said to be under the restraint of a criminal tribunal.' The operation of this system is illustrated by the 'Correspondence relating to the trial of a Maltese in the Court of the Bey of Tunis,' presented to Parliament, May, 1844. The testimony and remarks of Capt. Grey in his letter to Vice-Admiral Sir E. Owen, p. 21, are particularly deserving of attention.

one or other of these, or by other lawful means,' power and jurisdiction within divers countries and places out of, but adjacent to, our forts and settlements on the Gold Coast,' and directs letters patent to be passed under the public seal of the said forts and settlements, constituting an assessor or assistant to the native sovereigns and chiefs within the countries aforesaid. By a subsequent warrant of 13th May, 1856, the Queen directs with respect to the protected territories, near or adjacent to the forts and settlements on the Gold Coast, that an assessor to the chiefs of the said protected territories be appointed to exercise, in regard to certain civil and criminal matters and questions which may arise within the said protected territories, all such powers and jurisdiction as may at any time have been lawfully acquired by her Majesty in the said territories.*

5. The fifth head is jurisdiction by the ordinary home tribunals, not under treaty, for offences committed by native subjects on the territory of foreign States, both civilized and uncivilized.

The legislation of Great Britain is, on the whole, reserved with respect to this species of foreign jurisdiction; but the law of some countries goes so far in this direction, that they require our first attention.

The French Code d'Instruction Criminelle, art. 5 and 6, declares that any person, whether French or alien, who out of the territory of France, commits a crime threatening the safety of the State, or who forges the seal of the State, or current national coin, national papers, or bank-notes authorized by the law, may be prosecuted, sentenced, and punished in France, according to the provisions of the French law.† Provisions similar to these occur in the criminal codes of the Netherlands and of

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* See Lord Grey's *Colonial Policy*, vol. ii. p. 270—276; *Parl. Papers*, 1855, No. 383; 1856, No. 433.

† Fœlix, § 550—3.

Sardinia.* The acts designated are treasonable attempts, or forgery of legal coin, or of national paper money or instruments. Wherever they may be committed, they have a direct tendency hostile or mischievous to the Government of the State.

The legislation of many States, however, in subjecting to punishment acts committed without the territory, does not stop at offences of a public nature. The Penal Code of Austria enacts that crimes committed by an Austrian subject in a foreign State shall be punished, on his return, according to the provisions of the Austrian Code, without reference to the laws of the country where they were committed (Art. 30). A similar rule exists in Bavaria, Oldenburg, Hanover, Wurtemberg, and other German States. The Sardinian Code adopts the same rule, but diminishes the punishments for offences committed out of the territory, by one degree.† The Prussian Code declares that a Prussian who has committed in a foreign country an offence of a serious nature, punishable by the Prussian law, and also by the law of the country itself, may be punished in Prussia.‡ In France, Art. 7 of the Code d'Instruction Criminelle declares that every Frenchman who has committed a crime against a Frenchman out of the French territory; may, on his return to France, be tried, prosecuted and sentenced, if he has not been prosecuted and sentenced in a foreign country, and if the Frenchman who has received the injury makes a complaint against him.§ The result of this state of the law seems to be that a Frenchman may accuse a Frenchman of a theft or other offence committed against him in any foreign country near or distant, civilized or uncivilized, and subject him to punishment; but that if a Frenchman murders a Frenchman in a foreign country, he cannot

* Fœlix, § 557—8. † *Ib.* § 557, 558.
‡ See Berner, p. 95—125; Mohl, p. 471.
§ Berner, *ib.* 133.

be punished because the injured party cannot make complaint. The French law provides no punishment for an offence committed abroad by a Frenchman against a foreigner.

The criminal law of Belgium goes further with respect to the punishment of natives for offences committed abroad. The law of 30th December, 1836, provides that a Belgian who commits a crime against a Belgian abroad, may be punished for it as if it had been committed within the kingdom; and that a Belgian who commits a crime against a foreigner abroad may be punished for it if the injured person or his family make complaint, or if official notice is given to the Belgian authorities by the authorities of the place where the crime has been committed.

The law of England does not attempt to exercise a criminal jurisdiction with respect to large classes of offences committed in foreign civilized countries; but there are certain acts committed abroad which fall within its scope. Upon an indictment for high treason, a charge of adhering to the King's enemies would be supported by evidence of acts done abroad. The 35 Hen. 8. c. 2. declares that treasons, misprisions of treasons, or concealments, committed out of England, shall be tried in like manner as if they had been committed in the shire where the trial takes place. The law of other countries contains a similar rule with respect to the crime of treason; for example, that of Prussia, which expressly declares that a Prussian may be punished at home for treasonable acts committed in a foreign country.* This regulation is quite consonant with sound principle. Treasonable acts, involving hostility to a Government (in which the essence of treason consists) may be committed out of the national territory, or they may be committed partly out of it and partly in it. Such acts, if committed in a foreign country, are dispunishable by the law of that country; and therefore the inclu-

* Berner, *ib.* p. 134.

sion of acts done abroad in the law of treason, does not involve any duplication of jurisdiction, or any interference with the wholesome rule of trying criminal offences in the local forum. Again, the law of England recognises the validity of foreign marriages; and, therefore, if a man marries one wife in England, and another wife abroad, it holds him liable to the punishment for bigamy.* If a man commits a forgery abroad and utters the forged instrument in England, he is punishable under the 1 W. 4. c. 66. s. 30.; but the offence here consists in the uttering.

The only case in which the law of England attempts to exercise a local criminal jurisdiction over the whole world, and with regard to every class of British subjects, is that of homicide. By the 33 Hen. 8. c. 23, it was enacted that a commission might be issued under the great seal for the trial of any person thought guilty of murder, in whatsoever place, within the King's dominions or without, the offence was committed; and this Act was extended to accessories before the act of murder and to manslaughter by the 43 Geo. 3. c. 113. s. 6. (1813). By Sir R. Peel's Consolidating Statute of 1829, these enactments were repealed, and the following provision was substituted for them, which is now in force:—

'If any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessary before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein, as if the same had been committed within the limits

* See 9 Geo. 4. c. 21. s. 22. In bigamy, the venue may be laid in the county where the defendant is taken into custody; 3 *Chitty On Crimes*, 719. According to the common law, the venue must be laid in the county where the crime was committed.

of his ordinary jurisdiction, (9 Geo. 4. c. 31. s. 7, limited to England; same enactment for Ireland, 10 Geo. 4. c. 34. s. 10).

Although this universal foreign jurisdiction for homicide has been in force since the year 1541, the number of cases brought to trial under it appears to have been small; and therefore its preventive effect has probably been inconsiderable. The following are those of which a record has been preserved in the books.

The earliest reported case under the 33 Hen. 8. c. 23, is that of Governor Wall, who was indicted under this Act, and tried at the Old Bailey Sessions, in Jan. 1802, found guilty, sentenced to death, and executed. His offence was that, being commandant of the garrison of Goree, in Africa, in 1782, he murdered Benjamin Armstrong, a soldier of the garrison, by inflicting upon him 800 lashes.* In this case, both the person who committed the murder, and the person murdered, were British subjects; the act done professed to be in execution of a legitimate military authority; and the place was a possession of the Crown of England.

In R. *v.* Depardo (1807),† the indictment was for manslaughter, under 33 Hen. 8. and 43 Geo. 3. Depardo was charged with having, at Canton, in China, killed and slain William Burne with a knife. Depardo was a Spaniard who volunteered on board the *Alnwick Castle*, an Indiaman. Burne was an Englishman, serving in the same ship, which was lying in the Canton River. The wound was inflicted on shore. Judgment was not given, but the prisoner was discharged; apparently because he was an alien, and therefore not within the Act.

In R. *v.* Sawyer,‡ (1815), the prisoner was indicted,

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* 28 Howell's *State Trials*, p. 51. For an interesting account of this painful trial, see Lord Campbell's *Lives of the Chief Justices*, vol. iii. p. 147. The preamble of the Act of Hen. 8. shows that foreign jurisdiction was not its main object.

† Russell and Ryan, 134. ‡ *Ib.* 294.

under 33 Hen. 8. for the murder of Harriet Gasket, with a pistol shot, at Lisbon. Both persons were British subjects. The indictment was held good.

Rex *v.* Helsham was an indictment under the 9 Geo. 4. tried at the Old Bailey before Bayley, J., and Bosanquet, J. (1830).* Captain Helsham had killed Lieutenant Crowther in a duel fought at Boulogne, in France. The Court deemed an allegation that the prisoner and the deceased were subjects of his Majesty necessary, and ordered it to be inserted in the indictment. Bayley, J., left it to the jury to say whether they were satisfied by the evidence that Helsham was a British-born subject; for that they must be satisfied that such was the fact before they could pronounce him guilty. The jury found a verdict of not guilty.

R. *v.* De Mattos was an indictment for murder under 9 Geo. 4., tried at the Old Bailey (1836).† De Mattos, a Spaniard, wounded Jacob Kettle, a British subject, in Zanzibar, an island in the Indian seas, under a native chief; and Kettle died of the wounds in a British ship. It was held by Vaughan, J., and Bosanquet, J., that the prisoner could not be convicted because he was not a subject of his Majesty within the meaning of the Act, and also because the offence was not complete on land, as the wounded man died on shipboard. Verdict not guilty.

Reg. *v.* Azzopardi. Joseph Azzopardi, a native of Malta, was indicted under 9 Geo. 4. for the murder of a Dutchwoman at Smyrna, at the Central Criminal Court, and convicted and sentenced to death. Proof was given that Malta is a part of her Majesty's dominions. The point was reserved for the opinion of the judges, whether it was necessary under 9 Geo. 4. to constitute the offence of murder or manslaughter, that the person killed should be a British subject. The question was fully argued before

* 4 Carrington and Payne, 394.
† 7 Carrington and Payne, 458.

the judges, and they were unanimously of opinion that the conviction was right.* The capital sentence was commuted into transportation for life. The result of this decision is, that the opinion incidentally expressed by two judges in R. *v.* Sawyer was overruled, and that the enactment of 9 Geo. 4. was held to apply to the homicide of a foreigner in a foreign country by a British subject. Notwithstanding the decision in the case of Azzopardi, it is doubted by some lawyers of eminence, whether, if the question came to be reconsidered, this construction of the Act would be upheld. The places of the homicides which were the subjects of these six indictments, were Boulogne, Lisbon, Smyrna, Goree, Zanzibar, and Canton. In three of the cases both parties concerned were British subjects. The case of Bernard, who was indicted under 9 Geo. 4. in April, 1858, will be adverted to lower down.

The following section of the *Merchant Shipping Act*, passed in 1854, appears to apply the entire criminal law of England to offences against property or person, committed, either ashore or afloat, at any place out of the Queen's dominions by the master, seaman, or apprentice of a British ship, and to subject them to the jurisdiction of a British court :—

All offences against property or person, committed in or at any place, either ashore or afloat, out of her Majesty's dominions, by any master, seaman, or apprentice, who, at the time when the offence is committed, is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England. (17 and 18 Vic. c. 104, s. 267.)

* 2 Moody's *Crown Cases*, 288.

It seems that under this provision a theft, or even a common assault, committed by a British seaman upon a native in a foreign port might be the subject of an indictment under the Admiralty jurisdiction in England. It is possible, however, that the very extensive terms of this enactment might receive some limitation from judicial interpretation.

Some special enactments have been likewise made for the punishment of crimes committed by British subjects in uncivilized or uninhabited countries. Thus the 10 and 11 Will. 3. c. 25. s. 13, passed in 1699, provides that robberies, murders, and felonies, and all other capital crimes whatsoever, committed in Newfoundland or the islands adjoining, may be tried in any county in England. This, however, is not properly an example of foreign jurisdiction, for the sovereignty of the island of Newfoundland was at that time claimed by England, though disputed by France; the title of England was finally settled by the Treaty of Utrecht in 1713.

The 57 Geo. 3. c. 53 (1817), enacts that murders and manslaughters may be tried in any of his Majesty's possessions abroad, if committed under the following circumstances:—1. Committed on land at Honduras, by any person within the settlement. 2. Committed in the islands of New Zealand and Otaheite, or in any other islands, countries, or places not within his Majesty's dominions, nor subject to any European State or Power, nor within the territory of the United States of America, by the master or crew of any British ship, or by any person sailing or belonging thereto, or that shall have sailed in, or belonged to, and have quitted any British ship to live in any of the said islands, countries, or places, or that shall be there living.

The main object of this Act seems to have been to bring the offences named within the jurisdiction of colonial courts, and to avoid the expense and difficulty of sending prisoners for their trial to England; for the 33

Hen. 8. had been extended to manslaughter in 1813, and therefore at the time of the passing of the 57 Geo. 3. c. 53, all murders and manslaughters committed by British subjects on land out of the United Kingdom were triable in England. In like manner the 46 Geo. 3. c. 54, and the recent Act of 12 and 13 Vic. c. 96, direct that all offences committed at sea may be tried in the foreign possessions of the Crown. The 57 Geo. 3. appears, however, not to be limited to murders and manslaughters committed by British subjects; it seems to include persons living in any foreign country not subject to an European Power, or within the territory of the United States.

The 57 Geo. 3. c. 53, has served as a model to an enactment in 9 Geo. 4. c. 83, by which (s. 4) jurisdiction is given to the Supreme Court of New South Wales over all offences committed on the sea or in any island or country in the Indian or Pacific Oceans, not subject to the British Crown, by any British subject having sailed in, or belonged to, and quitted any British vessel to live in any such places, or that are there living. The statute of 57 Geo. 3. is now probably obsolete, if indeed it ever had any operation; but the Act giving to the Supreme Court of New South Wales a criminal jurisdiction in the islands of the Pacific Ocean seems to be occasionally called into activity. A master of an English brig was in July, 1851, indicted at the Supreme Court of Sydney, his offence being that on the 15th November, 1849, on board a British vessel, and upon the high seas, within the jurisdiction of the Supreme Court, he wilfully murdered a certain male adult, whose name was to the Attorney-General unknown, by shooting him with a blunderbuss. The prisoner had shot three natives who boarded his vessel off the island of Maree in the South Pacific. The defence was that he shot them in order to save his own life, and he was acquitted by the jury. The judge told the jury that it was their duty to deal with the case in

exactly the same manner as if the persons killed had been Englishmen.* It is possible that this indictment was tried under the Admiralty jurisdiction of the Supreme Court of Sydney, although the offence appears from the evidence to have been committed when the ship was close to the land.

A similar Act was passed in 1836, for giving a criminal jurisdiction over British subjects in the country adjacent to the Cape colony, inhabited by Kaffirs and other wild tribes. The 6 and 7 Wm. 4. c. 57, recites that 'the inhabitants of the territories adjacent to the colony of the Cape of Good Hope, to the southward of the 25th degree of south latitude, being in an uncivilized state, offences against the persons and property of such inhabitants and others are frequently committed by his Majesty's subjects within such territories with impunity.' It then proceeds to enact that 'the laws which are now, or shall hereafter be in force in the colony of the Cape of Good Hope, for the punishment of crimes therein committed, shall be applicable to all his Majesty's subjects within any territory adjacent to the colony, and being to the southward of the 25th degree of south latitude, and that every crime or offence committed by any of his Majesty's subjects within any such territory, in contravention of any such laws, shall be cognizable in any such courts, and shall be inquired of, tried, and prosecuted, and on conviction punished, in the same manner as if they had been committed within the colony.'

Now, on reviewing the five species of foreign or exterritorial jurisdiction which have been enumerated, we see clearly that they rest on different grounds, and are justified by different degrees of expediency. With respect to the first class, the practice of civilized nations has been invariable and undisputed. Each nation has exercised,

* See Captain Erskine's *Journal of a Cruise among the Islands of the Western Pacific*, p. 478 (1853).

without contest, an exclusive criminal jurisdiction over its own ships on the high seas. In so doing, it encroaches upon the rights of no other nation, and it performs a necessary function of government which otherwise would either remain unperformed, or be left to the unchecked authority of the captain. With respect to the second class, the slave-trade treaties between Great Britain and certain Powers, authorize the creation of mixed courts for the adjudication of ships bearing the flag of either of the contracting parties. This is an arrangement which it is competent to independent States to make in common, with the assistance of their respective legislatures, and it does not affect the rights of any third Power. The policy and efficiency of such an arrangement rest on grounds of their own, unconnected with the question of foreign jurisdiction, and therefore not requiring any notice in this inquiry. The separate jurisdiction for piratical offences committed on the high seas exists by the common consent of nations; as no one nation keeps the police of the seas, and as a pirate has no national flag, it is an inevitable consequence that he should be subject to the jurisdiction of every nation. At the same time any great maritime Power may, without arrogating to itself an undue ascendancy, earn the gratitude of other nations by clearing the seas of pirates; as when Rome, by the hands of Pompey, destroyed the pirates of the Mediterranean. The fourth species is the consular jurisdiction exercised, under treaty, in the Ottoman Empire, China, and other countries lying out of the limits of Christian or European civilization. This jurisdiction, like that of the mixed courts under the slave-trade treaties, is created by the consent of the two nations concerned; it injures the right of no third Power, and it rests entirely on special grounds. These special grounds are the reluctance of the Christian residents in a Mahometan or barbarous country to be subject to the native tribunals, the rude administration of justice by those tribunals, and the defective system of law which

they administer. In order to satisfy a powerful government, a weak and semi-barbarous nation consents to part with a fragment of its sovereignty, and to permit foreigners resident on its territory to be subject to their own criminal jurisdiction. This system has been adopted by all the great European Powers. France, in particular, obtained at an early date capitulations from the Porte on this subject, and her consular jurisdiction in the Levant has been elaborated with much care. The jurisdiction exercised by England on the Gold Coast is of a similar character; but it extends over a number of petty tribes, in a state much inferior to that of Oriental cultivation; it rests on sufferance and usage, not on written treaties; and it appears to be intended rather to benefit the natives, and to rescue them from their habitual state of lawless barbarism, than to protect the persons and property of English residents.

The last kind of jurisdiction, viz., the assumption of a power to punish crimes committed on the territory of a foreign State, not under special circumstances, or under treaty concessions, is that which is open to the most serious doubts, and which requires the fullest examination.

The system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operation, in whatever part of the world he may be, converts the criminal law into a personal statute, and puts it on the same footing as the law respecting civil *status*. Now the personal statute of one country, in civil matters, is recognised by another, so that there is no conflict of laws.* But if the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own State and that of the State of his domicile. No text-writer and no State disputes the rule, that all foreigners in a country are subject to its criminal law.†

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* Fœlix, § 31; Story, *Conflict of Laws*, § 16.

† Mohl, *ib.* p. 470.

The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory. But a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent, and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another State: it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law, and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offences committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other countries shows that a criminal law applicable to offences committed in foreign lands (such as the Act of 33 Hen. 8. and 9 Geo. 4.), is for the most part a *brutum fulmen*, and that it is rarely carried into execution. The slumber of the law is therefore in practice a sufficient security to the native subject against its oppression. But if a government was to set to work vigorously to execute such a system of foreign criminal law as that which is embodied in the Austrian and Prussian codes, the sense of insecurity would infallibly lead to loud complaints, and the legislature would be urged into the adoption of a less ambitious

course. Guilty men might occasionally be brought to justice; but innocent men, charged with the commission of crimes in distant parts of the world, would be almost incapable of defending themselves against the accusation and of proving their innocence. Even an educated person, provided with money and friends, might find it difficult to extricate himself from such a position; but a poor, uneducated, friendless man might be almost at the mercy of a false accuser. Such a law, if a government afforded funds and encouragement for its enforcement, might be a formidable weapon in the hands of unscrupulous malignity.

It may, therefore, be laid down, as a general principle, resting on grounds of the most enlarged expediency, that a criminal law ought to be local;* that the sovereign ought to enforce it with respect to all crimes committed within his territory, and in national ships upon the high seas; but should not seek to apply it to crimes committed in the territory or ships of other civilized States. Subjects such as the consular and slave-trade jurisdiction under treaty, may indeed form legitimate exceptions; and some crimes, such as treason and bigamy, may be reasonably supported by evidence of acts done out of the realm as well as within it. But, with these reservations, all foreign criminal jurisdiction is of questionable advantage. The modern enactment of 9 Geo. 4. (originally derived from the old Act of 33 Hen. 8.), which makes murders and manslaughters committed on land abroad punishable by the ordinary criminal courts of England, is open to the objection that it sanctions a policy which ought consistently to be extended to other

* Numerous dicta, of judges and text writers of different countries, on the local character of criminal law, are collected by Story, *Conflict of Laws*, pp. 874–7, who adds to them the weight of his own authority. Lord Brougham thus expressed the doctrine in Warrender *v.* Warrender: 'The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing, and the purpose of the jurisdiction.'

serious crimes, and that it is irregularly and capriciously enforced. Its best defence, perhaps, is that it is nearly inoperative. It would be easy to provide, by unobjectionable legislation, for cases such as that of Governor Wall, where a British subject was sentenced in London for the murder of a British subject in a foreign possession of the Crown. Circumstances may arise which would justify enactments such as that of the 57 Geo. 3. c. 53, for maintaining order among British seamen and seafarers resorting to a barbarous or thinly inhabited coast; but in such a case a local jurisdiction, if it can be obtained, is always preferable. It is much to be wished that those continental jurists, who extol the system of criminal jurisprudence over offences committed abroad, would show, by an appeal to facts and statistics, 1. That the jurisdiction is exercised on an extensive scale in any country; 2. That if exercised, its operation is beneficial. Arguments of this sort would be far more cogent than general declamations in favour of the cosmopolitan principle of a penal law. The reasoning which has been applied to this subject by the writers in question is open to the remark made by Bacon upon the constructors of imaginary commonwealths—that 'their discourses are as the stars, which give little light because they are so high.'

It must not, however, be supposed that the rigid territorial principle of criminal jurisdiction, though founded on sound principles, is exempt from its compensating disadvantages, or that the civilized world can be practically cut into separate sovereignties, each acting without reference to the criminal law of its neighbour. Where the territories of neighbouring nations are conterminous—where they are separated by a merely arbitrary line, without any natural demarcation, such as a chain of high mountains or a broad and unfordable river, and where, therefore, a facility of mutual passage across the frontier limit exists, there the entire independence of the two territories for the purposes of criminal jurisdiction may lead

to a permanent state of insecurity, both for person and property.

The state of the Border country between England and Scotland, before the union of the crowns under James I., affords a striking illustration of the mischiefs produced by the absence of a common criminal jurisdiction.. Even when peace existed between the Governments of England and Scotland, the Borderers kept up continual hostilities with one another. The evils of a chronic state of danger and fear led, indeed, to a system of qualified mutual forbearance with respect to the taking of life; but an incessant war was waged upon property, and the system of mutual plunder was unintermitted. Each crown, for the purpose of maintaining order in the respective Border districts, appointed Wardens of the Marches, who exercised an important local jurisdiction. But the main object of this jurisdiction was to prevent all intercourse between the natives of the two kingdoms; and the principal heads of the code of March-treason (as it was called) consisted in acts of misprision, or connivance, or submission, with respect to the freebooters of the opposite country. Where the robbers were caught in the act, the Border laws permitted an immediate pursuit across the Border, accompanied with certain formalities; but where the delinquent escaped unseen, the only remedy afforded by these laws was, that the injured person might challenge the delinquent to a judicial combat. The union of the crowns, by producing a joint action of the Border authorities, suppressed these disorders.*

The improved civilization of modern times prevents the existence of such a state of insecurity and rapine as that which existed on the Scotch and English frontier in the fifteenth and sixteenth centuries, even under similar legal relations; but where similar legal relations exist,

* See Walter Scott's 'Essay on Border Antiquities,' *Prose Works*, vol. vii. pp. 83, 87, 98, 104, 106, 115, 118, 138 (ed. 1834).

the corresponding consequences reappear, though in a less aggravated form.

The following statement was made by M. Laplagne-Barris in 1843, in the French Chamber of Peers, in a debate upon a proposal for altering the law respecting crimes committed abroad :—

I have had the honour to discharge for four years the functions of *Procureur-Général* in a district which included seventy leagues of frontier (about 170 English miles), and it has happened to me, not merely ten or twenty times, but much more frequently, to lament the restrictions which Art. 7 of the *Code d'Instruction Criminelle* imposed upon me. I have often been witness to facts which amounted to real outrages upon public morality—facts which were of a nature to degrade and impair morality in the opinion of the people, especially of the inferior class. I have often been forced to see assassins, incendiaries, poisoners, whom no French magistrate could attempt to arrest, and who had committed their crime at the distance of a few leagues from the village where they had established their abode. I may be permitted to mention a case which I witnessed in the latter period of my official duties. A Frenchman—a monster of cruelty—dwelt in a village separated by an ideal line from a conterminous Prussian village, which had formerly been a part of France, and had only ceased to belong to it in consequence of the misfortunes of 1815. This man murdered his sister and his brother-in-law in the Prussian village; and I left him at liberty, walking insolently about the streets of the French village, where he enjoyed perfect impunity.*

M. Villefort states, that numerous offences connected

* See Villefort, *Des Crimes et des Délits Commis à l'Etranger*, p. 13. It seems that Art. 7 of the *Code d'Inst. Crim.* was inapplicable to this case, either because the man's sister had lost her nationality, and therefore the crime was not committed upon a French subject, or because, being dead, she was unable to make a complaint against him. If the latter condition is construed strictly, it would follow that a Frenchman could be punished for a theft, but not for a murder committed abroad. As the French Government does not surrender a native, this case would not fall under an Extradition Treaty.

with rural and forest laws are committed on the French frontiers, and are the subject of frequent complaints from the conterminous States, but that they go wholly unpunished.*

"In an island placed under a single sovereignty, the inconveniences of this state of things can never be felt. It can never have a lawless Border population carrying on a predatory war across an imaginary territorial line. But where there is a land frontier, the evils of an independent criminal jurisdiction must always be experienced to a greater or less extent, unless they are guarded against by appropriate remedies. As the administration of criminal justice, even within the limits of an independent State, is, for manifest reasons of convenience, to a great extent local —as in England, for example, the general rule of law is, that the venue must be laid, and the indictment tried, in the county where the offence was committed—we may infer that if a country intersected by a frontier line of two States were entirely subject to the same sovereign, the criminals on each side of that line would in general be tried in their respective districts. Now, if, by any voluntary arrangement, the same result could be brought about, notwithstanding the separation of territories, the evils of independent sovereignty would so far be counteracted. This result has, to a certain extent, been attained by the system of criminal extradition.

The doctrines of text-writers on the moral obligation of a State to surrender fugitive criminals to the State where the crime was committed, have differed widely.

Grotius holds that a State in which a foreign criminal takes refuge, ought not to oppose any obstacle to his punishment by the State in which the crime was committed; and that as one State is not accustomed to permit another State to send armed men on its territory for the purpose of seizing criminals, it becomes necessary that

* *Ib.* p. 23.

the State should either punish the fugitive, or should deliver him up to the other State to be punished at its discretion (II.'21, § 3, 4). Vatel lays it down that a sovereign ought to compel a fugitive criminal to make reparation, or to punish him, or to deliver him up to the injured State :—

This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries, and robbers are seized everywhere, at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice. The matter is carried still further in States that are more closely connected by friendship and good neighbourhood. Even in cases of ordinary transgressions which are only subjects of civil prosecution, either with a view to the recovery of damages or the infliction of a slight civil punishment, the subjects of two neighbouring States are reciprocally obliged to appear before the magistrate of the place where they are accused of having failed in their duty. Upon a requisition of that magistrate, called Letters Rogatory, they are summoned in due form by their own magistrates, and obliged to appear. An admirable institution, by means of which many neighbouring States live together in peace, and seem to form only one republic. (B. ii. § 76.)

Kent, likewise, affirms the duty of extradition with respect to the more serious class of crimes :—

It is declared by some of the most distinguished public jurists that every State is bound to deny an asylum to criminals, and upon application and due examination of the case, to surrender the fugitive to the foreign State where the crime was committed. The language of those authorities is clear and explicit, and the law and usage of nations, as declared by them, rest on the plainest principles of justice. It is the duty of the government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial. The guilty party cannot be tried by any other jurisdiction than the one whose laws have been violated, and therefore, the duty of surrendering him applies as well to the case of the subjects

of the State surrendering as to the case of subjects of the Power demanding the fugitive. The only difficulty, in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not, apply, inasmuch as it is understood in practice to apply only to crimes of great atrocity, or deeply affecting the public safety. (1 *Com.* 39.)

On the other hand, Puffendorf holds that a State is only bound by treaty engagement, or by some special circumstance, to surrender a fugitive criminal.* The majority of modern writers adopt a similar view, and make extradition a question of national comity, in the absence of express stipulation.† According to the generally received doctrine, if a person commits a crime, of whatever character or magnitude it may be, in one State, and escapes into another State, the former State cannot demand his extradition as a matter of right from the latter State. The refusal of such a demand might be an unreasonable or an unfriendly act; but it could scarcely be an act which would be held to justify menace, or reprisals, or war, in the case of Powers of equal magnitude, or to justify coercion by a stronger over a weaker Power.‡

The actual practice of the civilized world differs widely as to the surrender of fugitive criminals. The system of Austria, Prussia, and the other German States, is to afford the utmost facility to extradition, and to extend it to the largest possible number of crimes. At the same time they withhold the extradition of their own subjects for crimes committed abroad. The system adopted by France, Belgium, and Switzerland, is to deliver up fugitive crimi-

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* viii. 6, 12. This is the passage which Story, *Conflict of Laws*, p. 879, states that he could not find.

† The opinions of writers of authority are collected by Fœlix, § 608; Mohl, p. 508–512; Story, *ib.* p. 878.

‡ See 1 Wheaton, 160.

nals only for serious offences, not being of a political nature. These countries, likewise, strictly maintain the exception of native subjects.*

With respect to England, Lord Coke long since laid down the general doctrine that it was a part of the laws and liberties of a kingdom, that fugitives were not to be surrendered.—'It is holden' (he says in his *Third Institute*), 'and so it hath been resolved, that divided kingdoms under several kings, in league one with another, are sanctuaries for servants or subjects flying for safety from one kingdom to another; and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered.'† And he cites, in confirmation of his position, the following passage from Camden's *History of Queen Elizabeth*, referring to the year 1584:—

The Lords Paget and Arundel, being come into France, Sir Edward Stafford, the Queen's ambassador there, diligently observed them, yet could by no means discover what they were contriving. He dealt, nevertheless, with the French king, that they, Morgan, and other Englishmen, who were plotting against their prince and country, might be removed out of France. But he received no other answer than this, 'that if they attempted anything in France, the king would punish them according to law; but if they had attempted anything in England, the king could not take cognizance thereof, nor proceed against them by law. That all kingdoms were free for fugitives, and that it concerned every king to maintain the privileges of his own kingdom; yea that Queen Elizabeth herself had not long since received and harboured in her kingdom Montgomery, the Prince of Condé, and others of the French nation; and that Segurie, the King of Navarre's ambassador, lay in England at this very time, hatching new troubles against the French king.' (p. 295, ed. 1675.)

The constitutional doctrine seems now established in

* A full account of the Extradition Treaties of the Continental States is in Fœlix, § 618–643; 1 Phill. *Com.* 418–426.

† 3 *Institute*, 180.

this country, that it is competent to the Crown to make treaties with foreign States for the extradition of criminals, but that those treaties can only be carried into execution by an Act of Parliament; and that it is not competent to the executive power without statutory authority to seize an alien in this country, and to deliver him to a foreign Government.* After some conflicting decisions, it appears to be settled as law in the United States that a fugitive criminal cannot be surrendered to a foreign State without express legislative authority.†

England has two Extradition Treaties in force, namely, with France and the United States; both confirmed by Act of Parliament.

The treaty between France and Great Britain bears date February 13, 1843; and by it the high contracting parties agree to deliver up mutually to justice persons accused of the crimes of murder, attempt to murder, forgery, and fraudulent bankruptcy, committed within the jurisdiction of the requiring party.‡ This treaty is little more than a transcript of the 20th Article of the Treaty of Amiens, between the Governments of France, Spain, Holland, and Great Britain, signed on the 2nd March, 1802.§ An article containing stipulations similar to those in the Extradition Treaty with France is in the Treaty between the United States and Great Britain of 9th August, 1842, negotiated and signed by Lord Ashburton; the crimes being murder, piracy, arson, robbery, forgery, or the utterance of forged paper.|| A case under the

* See the opinions of the law lords in the debate on the case of the Creole, House of Lords, Feb. 14, 1842, and the statement of the doctrine in 1 Phill. 413.

† 1 Kent, *Com.* 39—42, ed. 8.

‡ 7 Hertslet's *Treaties*, 356.

§ *Ann. Reg.* 1802, p. 313.

|| 6 Hertslet's *Treaties*, 843. The extradition stipulations with France and the United States were confirmed and enforced by 6 & 7 Vic. cc. 75 & 76; 8 & 9 Vic. c. 120. The mention of piracy in the Ashburton Treaty must refer to constructive piracy, of which there

latter treaty, of Thomas Kaine, an Irishman, charged with a murder in the county of Westmeath, came before the court of proper jurisdiction at New York, in 1852; and it was decided that the evidence required to justify the extradition had been produced.*

The number of applications for the extradition of fugitive criminals made by France upon England in the five years 1854–8, was seven; in none of these cases was a warrant of extradition granted; and no application has been made by France since March, 1856. The number of similar applications made by the United States in the same five years has been eleven, in six of which a warrant of extradition was granted. These six were all cases of murder or attempt at murder; and they all occurred on the high seas in American ships which put into Liverpool, so that the witnesses were on board, and could easily appear before the magistrate.

The practical difficulties which have obstructed the enforcement of the Extradition Treaty with France on this side of the water led to the negotiation of an amended treaty between the two countries. This convention, drawn with care and ability, was signed on the 28th of May, 1852,† and by it the obstacles which have rendered the Treaty of 1843 inoperative would have been removed; but the Bill necessary for giving it effect was abandoned in consequence of the objections made to it in the House of Lords.‡

Besides these stipulations with France and the United States, England has likewise an agreement with China for the extradition of criminals flying from justice. The

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are many examples in our law. Piracy, properly so called, is not a territorial crime; it is a crime which each nation can punish for itself. A person accused of piracy, in the strict sense of the term, need never be the subject of extradition.

* See the report of the case in 1 Phill. *Com.* 516.

† 9 Hertslet's *Treaties*, 281.

‡ See the Lords' debates of June 8, 11, 14, and 25. 1852.

Treaty of 8th October, 1843, provides, with respect to the five ports of Canton, Foo-chow-foo, Amoy, Ningpo, and Shanghai, thrown open to the British trade, that Chinese criminals flying to the five ports should be handed to the Chinese authorities, and English subjects flying to the Chinese territories should be handed to the nearest British consular officer (sect. 9).* The treaty of Tientsin contains other provisions respecting the extradition of Chinese criminals, which are not reciprocal (art. 21).

Independently of the extradition to foreign countries, the Constitution of the United States gives ample powers for the extradition of persons charged with treason, felony, or any other crime, between the several States of the Union.† It contains likewise a similar power with respect to fugitive slaves.‡ It may be added, that the right of pursuing fugitive criminals into its own territory is sometimes conceded by one German State to another as a consequence of their federal relations.§

In considering the principles which ought to govern the extradition of criminals, we may, in the first place, revert to the maxim already laid down, that the administration of criminal law is essentially local. It is the peculiar interest of the district to maintain order by protecting person and property. It is on the spot where a crime is committed that the proofs of a criminal's guilt can be most effectually, most easily, and most inexpensively obtained. It is at the place where a crime is alleged to have been committed, that the accused person can best establish his innocence, if he be falsely charged, or prove any extenuating circumstances which may exist in his favour. It is equally conducive to the repression

* Tuson, 178.

† See Story's *Comm. on the Const. of the U. S.*, vol. iii. §§ 1801-3.

‡ *Ib.* §§ 1804-6. Compare Curtis, *Hist. of the Const. of the U.S.*, vol. ii. pp. 449—467.

§ This right of international pursuit is called *Nacheile:* see Fœlix, § 598. Martens, *Law of Nations*, b. 3, c. 3, s. 24.

of crime and to the protection of innocence, that criminal trials should be held near the place where the offence is alleged to have taken place.

If, therefore, a comity of nations for the enforcement of criminal law is desirable; if there ought to be a combined action of independent States for the repression of crimes; it follows that the proper mode of attaining this end is, not by an attempt to exercise a criminal jurisdiction upon the territories of foreign States, but by extradition. If an accused man is tried at home for an offence committed abroad, he is withdrawn from the neighbourhood of the place where the crime is declared to have been committed, and is transferred to a distant tribunal; whereas extradition remits the accused man to his natural forum, the forum of the district which was the scene of the alleged offence. It is generally acknowledged, both by text-writers on the law of nations, and by practical statesmen, that there is a presumption in favour of extradition, provided that it be restricted within certain limits and guarded by certain conditions. The following opinions were expressed by Lord Brougham and Lord Campbell in the House of Lords on the 14th of Feb., 1842:—

Lord Brougham.—He thought the interests of justice required, and the rights of good neighbourhood required, that in two countries bordering upon one another, as the United States and Canada, and even that in England, and in the European countries of France, Holland, and Belgium, there ought to be laws on both sides giving power, under due regulations and safeguards, to each Government to secure persons who have committed offences in the territory of one, and taken refuge in the territory of the other. He could hardly imagine how nations could maintain the relationship which ought to exist between one civilized country and another without some such power.

Lord Campbell.—For his own part, he should like to see some general law enacted, and held binding on all States, that each should surrender to the demand of the others all persons

charged with serious offences, except political. This, however, he feared, was a rule or law which it would be difficult to get all nations to concur in.

The restrictions and conditions by which the system of extradition ought to be guarded, may be considered under three heads—viz., 1. The crimes for which the extradition should be made. 2. The classes of persons with respect to nationality who should be liable to extradition. 3. The evidence and formalities which should authorize the extradition.

1. As to the crimes for which extradition should be made:—It is apparent that between countries separated by the sea, as England and France, or at a distance from each other, as Spain and Prussia, or Russia, there is no ground for extradition beyond the most serious class of crimes. Offences such as the English law includes under the name of misdemeanours, and the French law under that of *délits*, ought not, with respect to countries so situated, to be comprehended within the system of mutual extradition. Even with regard to petty acts of depredation, which the law both of England and of the United States would consider felonies, it would not be worth while to incur the expense and trouble of sending a man across the Atlantic in order to undergo his trial. For countries only divided by a land boundary, the case is different; and it might, for the maintenance of order upon the frontiers, be expedient to descend lower, and to include many subordinate offences which distant States, or States divided by an arm of the sea, need not notice. Thus some of the German States apply the system of extradition to smuggling, and to offences against forest laws and other rural delinquencies.

With the exception of countries having a common land frontier, the system of extradition would be limited to the more serious class of crimes. Even from this class, however, a further deduction must be made for political offences. The crimes to which the principle of inter-

national extradition properly applies are those which concern the lives and property of individuals, and which the entire nation has, therefore, a common interest in repressing. If all Governments were perfectly equitable and dispassionate, the principle might be safely extended to political offenders; but in the prosecution of political offences, the Government may be considered as an interested party, and, therefore, another Government is indisposed to give up persons charged by it with crimes of this complexion. The question seems to involve a contest between the Government and a portion of its subjects; and the extradition assumes the character of interference in the internal political affairs of another State. In cases, therefore, of civil war, of revolution, or of active political proscription leading to the existence of a large body of political exiles, a powerful State, which does not fear the displeasure of the foreign Government interested in the question, is impelled by the dictates of humanity to afford them an asylum, and to refuse their extradition when demanded.

The protection which is thus afforded to individuals against the tyranny of Governments, is illustrated by Gibbon, in reference to the far-reaching dominion of Rome, which pursued a criminal into the remotest corners of the civilized world:—

> The division of Europe [he says] into a number of independent States, connected, however, with each other by the general resemblance of religion, language, and manners, is productive of the most beneficial consequences to the liberty of mankind. A modern tyrant, who should find no resistance either in his own breast or in his people, would soon experience a gentle restraint from the example of his equals, the dread of present censure, the advice of his allies, and the apprehension of his enemies. The object of his displeasure, escaping from the narrow limits of his dominions, would easily obtain, in a happier climate, a secure refuge, a new fortune adequate to his merit, the freedom of complaint, and perhaps the means of revenge. But the empire

of the Romans filled the world, and when that empire fell into the hands of a single person, the world became a safe and dreary prison for his enemies. The slave of imperial despotism, whether he was compelled to drag his gilded chain in Rome and the Senate, or to wear out a life of exile on the barren rock of Seriphus, or the frozen banks of the Danube, expected his fate in silent despair. To resist was fatal, and it was impossible to fly. On every side he was encompassed with a vast extent of sea and land, which he could never hope to traverse without being discovered, seized, and restored to his irritated master.*

It may be added that the division of ancient Greece and of mediæval Italy into numerous republics afforded facilities for the reception of bodies of political exiles in foreign States. A political party which was expelled from one State took refuge in another State where its principles were in the ascendant. Thus a body of oligarchs ejected by the democratic party would take refuge in an oligarchical State; a body of Ghibellines ejected by the Guelphs would take refuge in a State where the Ghibelline party were superior. In like manner, the French Protestants took refuge in Protestant countries after the Revocation of the Edict of Nantes; and the French *emigrés,* during the Revolution of 1789, fled to countries which were hostile to their own revolutionary Government.

The Extradition Treaties of France,† England, and the United States exclude political crimes; on the other

* *Decline and Fall,* c. 3, *ad fin.* Mr. Merivale remarks that, under the Republic, a Roman citizen was allowed to escape from a capital charge by going into voluntary exile, and that certain of the allied cities were specified by treaty as inviolable places of refuge; but that, under the empire, these cities were absorbed into the imperial provinces, and were thus deprived of their protecting character.—*Hist. of Romans under the Empire,* vol. iii. p. 495.

† A circular of the French Minister of Justice, of April 5, 1841, lays down the following principle with respect to extradition:—'L'extradition ne peut avoir lieu qu'à l'égard du prévenu d'un fait passible, d'une peine afflictive et infamante, c'est-à-dire d'un crime autre qu'un crime politique, et non d'un délit."—Fœlix, § 613.

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hand, Austria, Prussia, and the other States of the German Confederation extend the principle of extradition to this class of offences.*

In a debate in the House of Commons of 1st March, 1815, Sir James Mackintosh thus defined the approved practice of civilized nations with respect to the surrender of political refugees:—

> I believe that I may venture to lay it down, if not as a part of the consuetudinary law of nations, at least as agreeable to the usage of good times, that though nations may often agree mutually to give up persons charged with the common offences against all human society, civilized States afford an inviolable asylum to political emigrants.†

After the defeat of the Polish and Hungarian insurgents by the Governments of Russia and Austria in 1849, many Hungarians and Poles, engaged in that conflict, fled to the Turkish dominions, and were conducted to Widdin. The extradition of the Poles was formally demanded by Russia, and that of the Hungarians by Austria. The Turkish Government, acting under the advice of the Governments of England and France, refused the extradition; whereupon the Emperors of Russia and Austria broke off their diplomatic relations with the Porte. The demands were subsequently withdrawn, and diplomatic intercourse was re-established, on condition that the refugees should be removed to the coast of Asia Minor. On this occasion, Lord Palmerston, in despatches addressed to the British Ministers at Vienna and Petersburg, for communication to the respective Courts, thus broadly laid down the doctrine with respect to the refusal of extradition in the case of political refugees (October 6, 1849):—

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* Mohl, *ib.* p. 486.

† See the debate on Mr. Whitbread's motion, March 1, 1815, in condemnation of the delivery of certain refugee Spaniards by the Commander of Gibraltar to the Spanish Government.

If there is one rule which more than another has been observed in modern times by all independent States, both great and small, of the civilized world, it is the rule not to deliver up political refugees, unless the State is bound to do so by the positive stipulations of a treaty; and her Majesty's Government believe that such treaty engagements are few, if indeed any such exist. The laws of hospitality, the dictates of humanity, the general feelings of mankind, forbid such surrenders; and any independent Government, which of its own free-will were to make such a surrender, would be deservedly and universally stigmatized as degraded and dishonoured.*

Professor Mohl denies that this doctrine is positive European international law;† but though not universally recognised, it is a principle which the Governments of States sufficiently powerful to defy dictation have acted and will continue to act upon, not only in all cases where their political and religious sympathies are concerned, but even upon the principles of general humanity. There are few readers of ancient history who do not sympathize with Themistocles, a suppliant on the hearth of Admetus, when his surrender was earnestly pressed by the Athenian and Lacedæmonian envoys, and was refused by the Molossian king; or who withhold their concurrence from the disapprobation with which Livy describes the ungenerous act of his countrymen in forcing the mean-spirited King of Bithynia to violate the laws of international hospitality by the extradition of Hannibal.‡ The means by which Charles II. induced the Dutch Government to deliver up

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* *Correspondence respecting Refugees from Hungary within the Turkish Dominions, presented to Parliament*, 1851, p. 33.

† *Ib.* p. 487.

‡ See the striking passage of Livy, xxxix. 51, which may be added to the other numerous proofs that the Romans were not animated by the spirit of narrow and exclusive nationality with which they have been often charged. At the end of the war with Antiochus, King of Syria, the Romans had stipulated with him, by treaty, for the extradition of Hannibal and four Greeks; but Hannibal escaped.—Polyb. xxi. 14; xxii. 26.

some of the regicides to his vengeance will probably meet with few defenders in the present day;* the demand made upon Hamburg by England for the surrender of Napper Tandy,† and that made upon Switzerland by France for the expulsion of Louis Bonaparte,‡ have been visited with

* See in Ludlow's *Memoirs*, vol. iii. p. 99, the account of the manner in which Colonel Barkstead, Colonel Okey, and Mr. Miles Corbet, were entrapped in Holland by Downing, the King's agent, seized by the States-General, and sent prisoners to England. 'Two things,' says Ludlow, 'seemed especially remarkable in this action—the treachery of Downing, after he had given assurance to a person sent to him by Colonel Okey to that end, that he had no orders to look after him; but chiefly the barbarous part acted by the States in this conjuncture, who, though they had themselves shaken off the yoke of tyranny, and to that time had made it a fundamental maxim to receive and protect all those who should come among them, yet, contrary to the principles of their government and the interests of their commonwealth, to say nothing of the laws of God, nature, and nations, without any previous engagement to the Court of England, contributed as much as in them lay to the destruction of these gentlemen. But a treaty was to be made with England, and their trade secured at any rate, though the foundations should be laid in blood.' By a subsequent treaty, the Dutch agreed to surrender to England all persons excepted from the Act of Indemnity, and all other persons demanded by the English Government.—*Ib.* p. 211. Okey, Barkstead, and Corbet were tried and executed with the other regicides.—5 Howell, *S. T.* 1302. Ludlow himself took refuge in Switzerland, and was protected by the Canton of Berne. Charles II., not being able to obtain his surrender, employed assassins to kill him, who, however, failed in their attempts. Mr. Lisle, another regicide, was assassinated by a royalist agent at Lausanne.—*Ib.* vol. iii. pp. 141, 150, 154, 171, 209, 235. Kluit, *De Deditione Profugorum*, p. 44 (Leyden, 1839), cited by Fœlix, condemns both this and a similar treaty made by Charles II. with Sweden.

† Napper Tandy, an attainted traitor, was arrested at Hamburg, by order of the Senate, in consequence of a requisition from the English Secretary of State, and delivered to the British authorities, Nov. 1798. He was afterwards arraigned upon his attainder at Dublin, and acquitted by the jury.—27 Howell, *S. T.* 1191.

‡ The expulsion of Louis Bonaparte from Switzerland was demanded by the Government of Louis Philippe, and he voluntarily left the country, Aug. 1838. See Martens, *Nouv. Rec. des Traités*, vol. xv. p. 638. (1840.)

reprobation; and it will be generally admitted that though a confederacy of Governments for mutual assistance in administering the criminal law of civilized nations is desirable, a confederacy of Governments for the punishment of all persons charged with rebellion and resistance to political rule, and for their pursuit over the whole world, would not tend to the general welfare of mankind in the present imperfect state of political institutions.

2. The second point to be considered, is the propriety of making any exceptions from the liability to extradition on the ground of nationality.

It will scarcely be disputed that, if the principle of extradition is to be applied anywhere; it ought to be applied to the case of a native-born subject who commits a crime in his own country, and flies from justice to a foreign territory. Nor will objection be made against its extension to the native of a third State, who commits a crime in one foreign territory, and flies to another, being a citizen of neither. The main question is, whether a State which recognises and acts upon the principle of extradition, ought to make an exception in favour of its own native-born subjects, by refusing their surrender.

Now when two civilized States agree to act reciprocally upon a system of extradition, each assumes that the criminal code of the other is founded upon rational principles of jurisprudence, such as are generally recognised in civilized countries, and is administered in an impartial and humane spirit by a body of competent judicial functionaries. Unless these assumptions are made, it would be unjust to surrender the citizen of a foreign State. But if these assumptions are made, no reason seems to exist why a State should not surrender its own subject who has committed one of the enumerated crimes in the territory of the other State. By the surrender of a criminal, whether a native-born subject of the surrendering State or not, to the State in which the crime was committed, the valuable principle of the local administration of criminal

justice is maintained. In such a case as that mentioned above, of a Frenchman who crossed a land frontier, murdered his sister and his brother-in-law, and returned into France—a case for which the French criminal law does not provide any punishment—extradition seems the proper mode of proceeding. If a murder were committed under similar circumstances by an Englishman—for example, if an Englishman were to cross the Channel, commit a murder in France, and return to England,—he might be convicted under the English law, even if the person murdered were not a British subject. But although the English law might reach such a case, it seems much more consonant with public policy to deliver up the offender, in order that he might be tried by the French criminal court having jurisdiction in the place where the homicide was committed, and that no attempt should be made to try in England a person accused of a murder committed in France.

The two Extradition Treaties of Great Britain—viz., with France and the United States—are general in their terms as to the classes of persons to be surrendered, and make no reservation of native subjects. On the other hand, Austria, Prussia, and the other German States, uniformly maintain the principle of excepting their own subjects from extradition to another State.* The same principle is likewise regularly embodied by France in her extradition treaties.† It is, indeed, omitted from the subsisting treaty with England of 1843, but it is inserted in the amended treaty of 1852, which has remained inoperative, in consequence of its not receiving the sanction of Parliament.

* Mohl, *ib.*, p. 486.

† The circular of the French Minister of Justice of 1841, already cited, lays down the following principle on this point:—'L'extradition ne s'applique pas aux nationaux refugiés sur le territoire de leur patrie: en conséquence la France ne peut demander que l'extradition d'un Français, ou d'un étranger refugié dans un pays autre que celui auquel il appartient.

It is laid down by Berner, as a universal principle, that a State ought never to surrender a native to a foreign criminal jurisdiction.* The reasons by which he supports this position are, that every man has an innate right to remain on the soil where he was born; that a man's right to his own home is of divine origin; and that the surrender of a native subject is inconsistent with national dignity. Such declamatory reasons as these raise a presumption that the writer was unable to adduce arguments founded on political utility.

If a State agrees to surrender its own subjects for crimes committed abroad, there seems no valid reason why it should not surrender the subjects of a third State under similar circumstances. But if it excepts its own subjects from extradition, States not parties to the treaty may be justified in objecting to the extradition of their subjects by such State without their consent. In some extradition treaties (as in that between France and Sardinia), the obligation is confined to the subjects of the other state; that is to say, State A agrees to surrender the subjects of State B, and State B to surrender the subjects of State A; but there is no stipulation with regard to the surrender of native subjects, or of the subjects of a third State.

3. We now come to the third point to be considered—

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* *Ib.* p. 184. It may be remarked that the Romans, who were not wanting in their assertion of national dignity, carried their doctrine of surrender further than modern nations; for their law required them to surrender citizens who offered violence to foreign ambassadors on the Roman territory, although this was a crime which would have been properly punished by a native tribunal. Eum qui legatum pulsasset, Quintus Mucius dedi hostibus quorum erant legati solitus est respondere. Dig. 50. 5. 17. Q. Mucius Scævola, the celebrated jurist, who was a generation older than Cicero, is referred to. Under this law two Romans were surrendered to the Apolloniatæ in 266 B.C., and two others to the Carthaginians in 188 B.C. Compare Rein, *Criminalrecht der Römer*, p. 175-6.

viz., the evidence and formalities which should authorize the extradition.

The Extradition Treaty of 1843 between France and England provides that the surrender of the accused person shall only take place 'when the commission of the crime shall be so established as that the laws of the country where the fugitive shall be found would justify his apprehension and commitment for trial, if the crime had been there committed.' A similar condition is inserted in the extradition article of the treaty with the United States. In both, the condition was transcribed from the Treaty of Amiens. The insertion of this condition in any treaty to which England is a party necessarily throws serious impediments in the way of its execution; because a justice of the peace in England must, before he issues his warrant for the commitment of an accused person, receive such evidence as raises a presumption of guilt against him. If therefore a fugitive from a foreign country is claimed from the English Government under a treaty containing this condition, it is necessary that a justice of the peace should be satisfied of his guilt by such evidence as would justify his commitment for trial at the next assizes or sessions. For this purpose the case must be prepared as it would be prepared in England, and witnesses must be sent over from the foreign country to be examined before an English magistrate. This is a costly, as well as a difficult process, because the agents of a foreign Government cannot know how to prepare a case for hearing before an English magistrate, or be informed of the amount of evidence requisite for procuring a commitment. In order to render a system of extradition effectual, the amount of proof and the formalities required should be as small as is consistent with the prevention of abuse. The essence of the system is, that confidence is reposed in the foreign Government and in its administration of criminal law. The assurance of that Government ought to be the chief guarantee against abuse. If therefore it claims any fugitive

through the accredited diplomatic channels, and gives a reasonable proof that there has been a proper investigation by the officers of police and the functionaries conducting the preliminary stages of judicature, and that this investigation had led to the conclusion that the person in question is guilty of the offence charged against him, it is desirable that the extradition should take place upon proof of identity of the party, and without any full investigation such as a magistrate would make for the commitment of a prisoner in this country. The Continental treaties do not contain any condition of this nature. Under them the extradition is agreed to be made upon the transmission of the warrant of arrest through the proper channel.* In the treaty of 1852 between France and England, art. 4 provided for the extradition mainly upon the authority of the foreign warrant of arrest; and it was in consequence of the objections offered to this article in the House of Lords, that the Bill for carrying the treaty into effect was abandoned by the Government.

The recognition of the criminal law of a foreign State, and the confidence in its regular and just administration, which is implied in a system of extradition thus carried into effect, is paralleled by the established practice of this and other countries with respect to the civil law. For certain purposes the law of England recognises the civil law of foreign States, and makes the validity of marriages, contracts, and wills depend upon the observance of its rules. It recognises the force of the *lex loci contractûs*, and acts upon the maxim that *locus regit actum*.† If a person domiciled in a foreign country, is there married, or makes a contract or will, the validity of his act is tried in an English court by the law of that country.

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* See, for example, the treaty between France and Bavaria, of 23 March, 1846, in Martens, *Nouv. Rec. Gén. des Traités*, tom. ix. p. 89 Gott. 1852

† See Story's *Conflict of Laws*, § 242.

In like manner, the law of England treats the judgment of a foreign court in a civil cause as conclusive with respect to the subject of action, and an action may be founded upon it in this country, by which the foreign judgment may be adopted and enforced, without any inquiry into its grounds.* Similar principles prevail in the law of every other civilized state.† It should be observed that the laws of one country have, as such, no force in another country;‡ and, therefore, that when one country enforces the law of another country with respect to any civil act done in that country, it makes the law its own, and, so far as respects its local operation, engrafts it into its own system.

Between the recognition of that part of the criminal law of a foreign State which does not relate to political offences, and the recognition of its civil law, there does not seem to be any material difference. There is no apparent reason why its law of homicide or forgery should not be as consistent with sound principles of jurisprudence as its law of marriage or of bills of exchange. But between the recognition of a foreign civil judgment and the recognition of a foreign criminal warrant, without inquiry into their grounds, there are these points of difference: that a judgment in a civil cause is a complete judicial act, whereas a warrant of arrest is only a preliminary act; and that a civil judgment relates only to an action between private parties, whereas the Government is, as prosecutor, a party in all criminal proceedings. It is true that these differences exist; but a warrant of arrest is a judicial act, though its effect is not final, but only to put an accused person on his trial; and although the Government is a party in all criminal prosecutions, it is only a nominal party in the prosecution of such crimes as are included in treaties of extradition.

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* Westlake, *Private International Law*, p. 370.
† Story, *ib.*; Fœlix, § 96. ‡ Fœlix, § 11, 318.

The assumption upon which a treaty of extradition rests is, that a civilized system of criminal law is executed with fairness, and that the cases claimed for surrender are those of offenders really suspected of the crimes with which they are charged. If a dishonest and colourable use were made of such a treaty; if, for example, a political refugee were charged with one of the enumerated offences for the purpose of bringing him within the power of his Government, and if, when he had been delivered up, he was punished for a political crime, it is clear that a system of extradition could not be maintained with a Government which so perverted the treaty. In order to guard against the occurrence of such an abuse, it would be necessary that each of the contracting parties should have the power of putting an end to the treaty by six months' notice, as in the subsisting treaty between France and Great Britain. A condition might, moreover, be inserted, similar to that in the extradition treaty between France and Belgium, by which each party reserves a discretionary power of refusing extradition in special and extraordinary cases falling within the terms of the treaty, the grounds of refusal in such a case being stated to the Government making the claim.* Some security would likewise be derived from the article in the extradition treaty between France and Sardinia, by which it is stipulated that 'no person whose extradition is granted shall, in any case, be prosecuted for any political crime anterior to the extradition, or for any offence connected with such a crime.'†

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*. Art. 2 of treaty between France and Belgium of 22 Nov., 1834 Martens, *Nouv. Rec. des Traités*, tom. iii. p. 732 (1837).

† Treaty between France and Sardinia of 16 Dec. 1838 (*Bulletin des Lois*, tom. xvii. p. 683), art. 6: 'Les crimes et délits politiques sont exceptés de la présente Convention. Il est expressément stipulé que l'individu dont l'extradition aura été accordée ne pourra être, dans aucun cas, poursuivi ou puni pour aucun délit politique antérieur à l'extradition, ou pour aucun fait connexe à un semblable délit.'

The main difficulty of carrying an extradition treaty into effect arises from the difference of forms of government and political institutions in the two countries concerned, from their recognition of different political standards, and from the discordance of their political sentiments. If, for example, two countries agreed in adopting the system of military conscription, a treaty for the mutual extradition of offenders against the conscription law would be easily concluded and enforced. But a country which filled the ranks of its army by voluntary recruiting, would probably not consent to a treaty for surrendering fugitives who fled from the punishment due to persons who evaded the compulsory conscription. The determined resistance made in America to the recent Fugitive Slave Law by the Northern States, may serve as an example to show what difficulties encompass the question of extradition, where conflicting opinions and feelings prevail; for in this instance the extradition was to be made, not between two independent nations forming a voluntary compact, but between the States of the same federal union, and under a statute merely subsidiary to the general provisions of the written constitution.

Some writers look to the maintenance of a universal criminal law, and even of a common jurisprudence for all nations, by each separate independent State. Hence they treat a national asylum as similar to the mediæval sanctuaries for criminals in churches and consecrated places;* they

* The right of sanctuary, as it existed in the middle ages, and as it still exists in the Papal dominions, was derived from antiquity. Tacitus speaking of the time of Tiberius, 22 A.D., has the following passage: 'Crebrescebat Græcas per urbes licentia atque impunitas asyla statuendi: complebantur templa pessimis servitiorum: eodem subsidio obærati adversum creditores, suspectique capitalium criminum receptabantur. Nec ullum satis validum imperium erat coercendis seditionibus populi, flagitia hominum, ut cæremonias deûm, protegentis.' (*Ann.* 3. 60.) The right of sanctuary was abolished in

regard it as a relic of barbarism, and as a manifestation of a selfish and exclusive, against a liberal, cosmopolitan, and comprehensive policy. They consider the lawlessness and other abuses produced by such domestic asylums for malefactors, as parallel to the effects of territorial sovereignty in affording a refuge to foreigners against their own criminal law; and they compare the alleged evils of international sanctuary with the admitted evils of ecclesiastical sanctuary.* But the recognition of a universal system of criminal and civil jurisprudence, though carried to a certain extent by the practice of civilized nations, is an impracticable chimera, inconsistent with the principle of territorial sovereignty. Even with respect to civil jurisprudence, the adoption of the foreign law can only take place in cases where there is a similarity of the social state in the two countries:—

> The fundamental maxim of private international jurisprudence [says Mr. Westlake in his treatise on the subject], that a right which by the appropriate territorial law has once accrued, shall thenceforth be universally recognised, can only be fully carried out between nations which possess common ideas on all the topics with which law is conversant. Whether between any two nations the jural intercommunion which the maxim would establish be in the main possible is a question of degree, depending on the number and importance of their differences on social matters. It need hardly be said that rights flowing from the Mahometan law of marriage could never be enforced in a

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England by 21 Jac. 1. c. 28. By the ancient law of this country, a person accused of a crime who took sanctuary, and confessed his crime, saved his life; but his blood was attainted, he forfeited all his goods and chattels, and he was forced to depart forthwith from the realm and never to return. (4 Blackstone's *Com.* 332.) Sanctuary was, therefore, far from conferring impunity.

* Prof. Mohl, *ib.* p. 515, speaks of every State which does not assist in enforcing obedience to the laws of foreign countries, and in thus maintaining the 'Weltrechtsordnung,' as a 'Schlupfwinkel,' 'eine Art von Raubschloss.'

Christian country; there are questions, on which even Christian countries diverge so widely from each other that their laws on them cannot be mutually received.*

The mutual recognition of the criminal law for ordinary offences implies a similar postulate. Hence in a free country the prevailing state of opinion will scarcely ever sanction the extradition of refugees charged by a foreign Government with political offences, nor in the existing state of civilization is it desirable to depart from the strict maintenance of the principle of territorial sovereignty with respect to this class of offenders.

The discussions which arose in this country at the beginning of the session of 1858 upon the proposal to alter the criminal law with respect to conspiracy to murder, show the importance of separating questions of foreign jurisdiction, or of the recognition of foreign law, from political offences in which the interests or passions of a foreign Government are involved. This proposal grew out of the attempt made upon the life of the Emperor Louis Napoleon, which was contrived and prepared by foreigners in this country, and executed at Paris. The murderous nature of the attack, the number of innocent persons who suffered from it, and the imminent danger to which the Emperor and Empress were exposed, naturally excited the indignation of the French Government, and aroused the sympathies of a large portion of the French people. Attention was inevitably directed to the means which the English law afforded for preventing the formation of such conspiracies in England, within a journey of a few hours from the French capital. The proposal of Lord Palmerston's Government was to amend the Common Law of England relative to conspiracy to murder;† but the measure fell to the ground in consequence of the

* *Treatise on Private International Law*, p. 181.

† See Lord Palmerston's speech on the Conspiracy Bill, and the Bill itself, Hansard's *Debates*, 8 Feb. 1858.

change of Administration. The Conspiracy Bill of Lord Palmerston had no peculiar reference to foreigners; it applied indiscriminately to British subjects and aliens; and its main object was to enact that a conspiracy to commit a murder, either at home or abroad, should be a felony, instead of being, as it is in England, only a misdemeanour. Its main enactment was the following:—

'Any person within the United Kingdom who shall conspire with, or incite, instigate, or solicit, any other person, being either within or without the United Kingdom, to commit murder, within or without the dominions of her Majesty, shall be guilty of felony.'

Soon afterwards an attempt was made, under Lord Derby's Government, to apply the existing Statute Law to the case. On the 12th April, 1858, Simon Bernard, a Frenchman, who was accused of being concerned in the plot against the Emperor Louis Napoleon, was indicted, on the prosecution of the Attorney-General, at the Central Criminal Court, under the Act of 9 Geo. 4. c. 31. s. 7. The first count of the indictment charged Orsini, Pierri, Gomez, and Rudio, with the wilful murder of Nicholas Battie upon land out of the United Kingdom, and out of her Majesty's dominions—to wit, at Paris, in the empire of France; and charged Bernard as an accessory before the fact in inciting them to commit such murder. In other counts, Bernard was charged as a principal. The following passage from the address of Lord Campbell, C.J., to the jury, describes the prisoner's offence, and the evidence by which it was supported:—

The offence with which he is now charged is that of being accessory to a plot for assassinating the Emperor of the French, which produced the death of Nicholas Battie, one of the Gardes de Paris, whose life was sacrificed upon that occasion; and unless you believe that the prisoner was implicated in that conspiracy, I think that he is entitled to your verdict. But if you believe that he—as there is strong evidence to show—being

acquainted with Allsop's views, and knowing that Allsop had got these grenades, assisted in having them transported to Brussels; if you believe that he bought in this country the materials for making the fulminating powder with which those grenades were charged; if you believe that, living in this country, and owing a temporary allegiance to the Sovereign of this country, he sent over the revolvers with the view that they should be used in the plot against the Emperor of the French; and if you believe that he incited Rudio to assist the three others assembled in Paris, knowing what their design was, and that he gave him money for that purpose, then it will be a fair inference, I think, to draw, that he had a guilty knowledge of that plot. . . . Treat Simon Bernard in this case as if he had been born within the metropolis of the empire to which you belong; let this case be exactly the same as it would have been (and I don't believe that in point of law it makes any difference) if he had been a native-born subject. I advise you, at all events, to treat him as a native-born subject, and if you find that he was implicated in the conspiracy against the life of the Emperor of the French—that he had a guilty knowledge and a guilty purpose, and that he did plot with others the death of the French Emperor—I think it will be your duty to find a verdict of guilty.*

On the sixth day the jury after a deliberation of an hour and twenty minutes found a verdict of not guilty. At a previous stage of the trial, the counsel for the prisoner stated the following points of law, all of which, with the exception of the seventh, were reserved by the court for the opinion of the 15 judges:—

1. That the prisoner is not one of her Majesty's subjects within the meaning of 9 Geo. 4. c. 31. s. 7. 2. That the prisoner was not an accessory before the fact to any murder within the meaning of the aforesaid statute. 3. That there is no proof of any murder having been committed within the meaning of that statute. 4. That the murder to which the

* *Times'* Report, April 19, 1858.

prisoner is charged by indictment to have been accessory before the fact, is proved to have been committed by aliens upon an alien within the kingdom of France, and not by any of her Majesty's subjects, or upon any of her Majesty's subjects. 5. That no evidence of any acts done by the prisoner on land out of the United Kingdom and without the Queen's dominions, or of any act done by any person in pursuance of any authority from him on land out of the United Kingdom, and without the Queen's dominions, was properly receivable in evidence on this trial. 6. That the principal offence of murder charged in the first three counts is not alleged to have been committed by any of her Majesty's subjects. 7. That the letter of 1 Jan. 1857, signed 'T. Allsop,' was improperly received in evidence against the prisoner. 8. That by the special commission this court is only authorized to inquire into and to try the prisoner on the charge of being an accessory before the fact to a murder committed by Orsini and others upon Nicholas Battie and a person name unknown, and that it has no jurisdiction to try the prisoner on the charge of wilful murder, as principal. 9. That the fourth and fifth counts, which charge the prisoner as a principal, set forth that the alleged murder was committed in Paris, out of the Queen's dominions, and that the prisoner, being an alien, cannot be tried as a principal for an offence so committed.*

The consent of the court to reserve eight points of law for the consideration of the judges, involving all the material parts of the case, proves that the construction of the Act is unsettled and doubtful; and it was not to be expected that a jury would consent to convict the prisoner of a capital charge upon a hypothetical state of the law. Even if the jury had found a verdict of guilty, the conviction would only have been sustained in case the fifteen judges had held: 1. That Bernard was a subject of her Majesty; and 2. That the murder of Nicholas Battie by Orsini and his three accomplices was a murder, within the meaning of the statute upon which the indictment was framed. The counsel for the prisoner did not call upon

* *Times*, April 16, 1858.

the court to decide these points before the verdict was delivered, and only applied to have them reserved. Their reservation, therefore, does not imply that the court would not have decided the law in the prisoner's favour, if their decision had been demanded. At all events, the acquittal of the prisoner left the law in a wholly uncertain state.

Inasmuch as the practical difficulty created by this case received no solution either from legislative reform or from judicial proceedings, it is apparent that in the event of the occurrence of a similar question with any foreign State, the confused and unsettled state of the law bearing upon it would be again disclosed, and would probably create embarrassment. Under these circumstances it is important to consider whether the experience of 1858 suggests any amendment in this branch of our criminal code.

Seeing that the main cause of the uneasiness of the French Government was the presence in England of numerous political refugees from the Continent, whom it believed to be engaged in designs dangerous to the French Emperor, the measure which would have most effectually met this complaint would have been the passing of an Alien Act under which the executive authority could have sent out of the country aliens suspected of acts hostile to a foreign Government.

The earliest Alien Act was passed in the year 1793 (33 Geo. 3. c. 4); and it remained in force until the conclusion of the war. A peace Alien Act was passed in 1816 (56 Geo. 3. c. 86), which was continued by successive enactments until 1826. A similar Act was passed in 1848, for the period of one year, and the then next session of Parliament (11 and 12 Vic. c. 20), which expired at the appointed time, and has not been since renewed.* The main object of all these Acts was to protect the English Government against the machinations and dangerous

* See 1 Phill. *Com.* 233.

influence of political refugees, or agents of foreign parties, at times of revolution and disturbance. The first Act was passed in the year in which Louis 16. was executed; the last Act was passed in the year in which the Government of Louis Philippe was overthrown. The latter statute expressly limits the power of sending an alien out of the kingdom to cases in which a Secretary of State or the Lord Lieutenant of Ireland 'has reason to believe from information given to him in writing, by some person subscribing his name and address thereto, that for the preservation of the peace and tranquillity of any part of this realm, it is expedient to remove such alien therefrom.'

It has never hitherto been the policy of this country to exercise the power of dismissing aliens for the protection of a foreign Government; though such a measure might be justified by a regard to British interests in preventing disputes with a foreign Power. The following declaration made by Lord Castlereagh upon the Alien Bill in the House of Commons, on the 10th of May, 1816, quite accords with the view of its policy taken by his predecessors—by Mr. Pitt, Lord Grenville, and Lord Hawkesbury:—

> He admitted, and indeed contended, that there could be no greater abuse of the law than by allowing it to be the instrument of indulging the malevolence of foreign Governments in gratifying personal resentments, or inflicting punishment on individuals who had committed only political crimes against those Governments. Unless the Executive Government of this country could bring home to any individuals the intention of shaking the Government of this country, they ought to be disarmed, with reference to those individuals, of the powers to be vested in them by the Bill.

In the enforcement of the Alien Act, its operation has not indeed been exclusively confined, in accordance with this doctrine, to the removal of aliens who were believed to entertain designs directly hostile to the British Govern-

ment. It has, in some cases, been applied to aliens who were accused of acts or designs hostile to a foreign Government—such removal being made on the ground that it would prevent a retaliation detrimental to British interests, and was a measure due by one Government to another. Thus, in 1803, Lord Hawkesbury consented, upon the requisition of the French Government, to send Georges and his adherents out of the country: he likewise consented to dismiss two French bishops, if they had circulated papers inducing the people in their old dioceses to resist the new Church establishment. He declined to send the Bourbon princes out of the country, if they conducted themselves in a peaceable manner; but he announced the King's wish that they might quit it voluntarily.* In 1806, Mr. Fox likewise took a step under the Alien Act for the protection of a foreign Sovereign who was then at war with this country. A Frenchman, named Guillet de la Gevrillière, made, in person, an offer to Mr. Fox to assassinate the Emperor Napoleon. Mr. Fox ordered him to be removed from the United Kingdom, and to be landed at a seaport remote from France. He wrote, moreover, to the French Minister for Foreign Affairs to inform him of what had been done.†

But the Alien Act of 1848 was expressly limited to 'the preservation of the peace and tranquillity of some part of this realm,' and it has now become a settled constitutional principle that a discretionary power of sending away aliens should not, except in extraordinary emergencies, be conferred upon the Executive Government. This doctrine is deliberately laid down in the despatch of Lord Granville to the representatives of her Majesty at Vienna, St. Petersburg, Paris, and Frankfort, dated Jan. 13, 1852. The despatch in question was written in answer to remonstrances addressed in concert to England by the great

* See the official correspondence in *Annual Register*, 1803, p. 661–9.

† *Annual Register*, 1806, p. 708.

Continental Powers, and may be considered as expressing the definitive policy of this country with respect to the protection of political refugees.*

Nevertheless, the law of England recognises the principle of protecting a foreign Government by its own municipal regulations. Hitherto this principle has only been laid down judicially with respect to political libels. In 1787, Lord George Gordon was tried for a libel on the Queen of France and the French chargé d'affaires, and was found guilty;† and, in 1799, in R. *v.* Vint and others, there was a conviction for a libel on the Emperor Paul published in the *Courier*.‡ These cases established the principle that a writing injurious to a foreign Sovereign or Government, published in England, is punishable as a criminal libel. In the case of R. *v.* Peltier, the prosecution of a French royalist for a libel on the First Consul during the peace of Amiens, the law was thus laid down to the jury by Lord Ellenborough, C.J., and the prisoner was found guilty:—

I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the pacific relations between the two countries. If the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the persons of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between the two countries, the libel assumes a still more criminal complexion.§

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* See the correspondence respecting the foreign refugees in London, presented to Parliament 1852, p. 24. The same principles are repeated in Lord Clarendon's speech in the House of Lords, 1st March, 1858.

† 22 Howell's *State Trials*, 213. ‡ 27 Howell, 627.

§ 28 Howell's *State Trials*, 617. For a statement of the complaints of the French Government respecting the incendiary attacks of the Belgian press, see protocol 22 of conferences on the Treaty of Paris, 1856.

The principle of common law, upon which these cases rest, has never yet been judicially extended beyond the law of libel; but its generality was recognised in the opinions expressed by the law lords in the House of Lords, on the 4th of March, 1853. The following exposition of the law was then delivered by Lord Lyndhurst:—

I will first take the case of British subjects. If a number of British subjects were to combine and conspire together to excite revolt among the inhabitants of a friendly State—of a State united in alliance with us—and these persons, in pursuance of that conspiracy, were to issue manifestoes and proclamations for the purpose of carrying that object into effect; above all, if they were to subscribe money for the purpose of purchasing arms to give effect to that intended enterprise, I conceive, and I state with confidence, that such persons would be guilty of a misdemeanour, and liable to suffer punishment by the laws of this country, inasmuch as their conduct would tend to embroil the two countries together, to lead to remonstrances by the one with the other, and ultimately, it might be, to war. I think my noble and learned friends who are now assembled here, and who perform so important a part in the deliberations of this House, will not dissent from the opinion I state with respect to British subjects. Now, with respect to foreigners. Foreigners residing in this country, as long as they reside here under the protection of this country, are considered in the light of British subjects, or rather subjects of her Majesty, and are punishable by the criminal law precisely in the same manner, to the same extent, and under the same conditions as natural-born subjects of her Majesty. In cases of this kind, persons coming here as refugees from a foreign State in consequence of political acts which they have committed, are bound by every principle of gratitude to conduct themselves with propriety. This circumstance tends greatly to aggravate their offence, and no one can doubt that they are liable to severe punishment. I will put the case in another shape. The offence of endeavouring to excite revolt against a neighbouring State is an offence against the law of nations. No writer on the law of nations states otherwise. But the law of nations, according to the decision of our greatest judges, is part of the law of England.

The legal doctrine thus perspicuously laid down by Lord Lyndhurst, was concurred in by Lord Brougham, Lord Truro, and Lord Chancellor Cranworth.

If, therefore, this doctrine be well-founded, it is a rule of our Common Law, that not only all acts done in the country, which by insulting the character, or by threatening the persons of foreign Sovereigns, or of functionaries of high dignity belonging to a foreign Government, tend to embroil our Government with foreign nations, are criminal, and punishable as a misdemeanour; but also all conspiracies to do such acts in foreign countries.

It is distinctly laid down by writers on international law, that, when political rebels take refuge in a neighbouring country, and assume an attitude openly threatening to their own Government, the permission of such menaces by the State which affords the asylum constitutes a breach of neutrality.

International law [says Dr. Robert Phillimore] considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right. The case of conflict indeed must be indisputable. Such a case, however, is quite conceivable. A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed. In this state of things the invaded State is warranted by international law in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their strongholds, as the exigencies of the case may fairly require. . . . . In all cases where the territory of one nation is invaded from the

country of another—whether the invading force be composed of the refugees of the country invaded, or of subjects of the other country, or of both—the Government of the invaded country has a right to be satisfied that the country from which the invasion has come has neither by sufferance nor reception knowingly aided or abetted it.*

It is on this principle that fortifications threatening the safety of a neighbouring State have sometimes been prohibited by treaty.†

The position of neutrality imposes upon a nation the duty of abstaining from all acts which favour either of two belligerent Powers; and hence it is held to be inconsistent with neutrality for a Government to permit a belligerent Power to arm and equip vessels of war within its ports, or to recruit men, and to organize a military force within its territory. This policy is embodied in our Foreign Enlistment Act, which rests on a policy now admitted generally throughout the civilized world.‡

An asylum implies security to a fugitive from his pursuers; but not the means of annoying them with impunity, or of converting the sanctuary into a battery. The residence of James II. and his descendants, in France, and the facility which they thus obtained for carrying on plots for their restoration to the throne of England, was a subject of perpetual solicitude to the British Government, and their exclusion from France was stipulated for in several successive treaties: in the Treaty of Utrecht, in the Quadruple Alliance of 1718, and in the Treaty of Aix la Chapelle. In consequence of the latter treaty, the young Pretender was seized by the French Government, in his coach, on the way to the opera, conveyed to the

* 1 *Com.* 227, 230. † 1 Wheaton, *Law of Nations*, p. 108.

‡ 59 Geo. 3. c. 69. See 2 Wheaton, p. 150; 1 Phill. *Com.* 397, 504; vol. iii. 212.

§ See Lord Stanhope's *History of England*, vol. iii. pp. 516, 521; 1 Phill. *Com.* 229. Flassan, *Hist. de la Dipl. Fran.*, vol. v. p. 429. Sismondi, *Hist. des Fr.*, vol. xxviii. pp. 462–5. Sismondi declares that it is contrary to the law of nations to allow a pretender to remain in a neighbouring neutral State.

State prison at Vincennes, and afterwards removed to the Pont de Beauvoisin, on the frontier of Savoy.§ If the location of Napoleon at Elba had been made by a State hostile to the restored dynasty of France, it might have been reasonably objected to as placing a dangerous pretender near the coast, in a place offering facilities for such an expedition as that which he subsequently made.

It is an admitted doctrine, that a State ought not to permit bodies of political exiles to remain in a position from which they can easily attack or disturb their own Government. This obligation is clearly described by Lord Palmerston, in reference to the Hungarian and Polish refugees in 1849 :—

The Sultan has duties of good neighbourhood to fulfil towards Austria; and those duties require that he should not permit his territory to be made use of as a place of shelter, from which communications should be carried on, for the purpose of disturbing the tranquillity of any of the States which compose the Austrian Empire. The Sultan is, therefore, bound to prevent these Hungarian refugees from hovering upon the frontier of Hungary or Transylvania, and he ought to require them either to leave the Turkish territory, or to take up their residence in some part of the interior of his dominions, where they may have no means of communicating with the discontented in the Austrian States.*

Lord Palmerston likewise declared in the House of Commons, 1 March, 1853, that England would not surrender foreign refugees; but that the latter were bound to abstain from courses calculated to give umbrage to foreign Governments, and to disturb the internal tranquillity of any foreign country. Fœlix states that when political refugees conspire, in the country which has given them an asylum, against the Government of their own

* To Lord Ponsonby, Oct. 6, 1849. *Correspondence repsecting Refugees from Hungary*, p. 33. Concerning the case of Koszta, see Laurence's *Wheaton*, p. 126 (Boston, 1855). It throws no light on extradition, but turns entirely on the right of this Hungarian refugee to be considered an American citizen, and to obtain the protection of the Government of the United States.

country, the measures which it is customary to take against them are to remove them from the frontiers to an appointed place of abode in the interior, or to expel them from the territory.* The course indicated in the latter passage was taken a few years ago by England in the case of the French refugees in Jersey (October, 1855). A large number of them had settled in that island, which, from its proximity to the French coast and its frequent communications with the Continent, gave them peculiar facilities for carrying on their designs against the Government of France. By the laws or constitution of Jersey, no foreigner can reside there without the permission of the Governor. The continued residence of these refugees in Jersey, therefore, involved the British Government in a sanction to these proceedings. They were all, consequently, ordered to quit the island; but they were not transferred to any 'appointed place of abode,' as the power of the Government did not extend beyond their removal from Jersey.

On the whole, it may be affirmed that, by the recognised principles of international law, an independent State is bound to prevent political refugees and other aliens from using its territory as a place for the preparation of measures hostile to another State, and that the permission to foreigners to use its territory for such a purpose is not only a breach of amity, but even of neutrality. This principle has been adopted by England as a ground of legislation in her Foreign Enlistment Act, and it is likewise the basis of the common-law doctrine that a publication tending to embroil the Government of England with a foreign Government is a criminal libel.

Now, in seeking to remedy the defects of our existing legislation with respect to conspiracies in the United Kingdom against the lives of foreign Sovereigns, it seems advisable rather to proceed upon the basis of the principle of international law just stated, than to attempt to attain

* § 609.

the end by indirect means, and by treating attempts on the lives of Sovereigns as ordinary attempts to commit murder. If a Sovereign is considered an usurper, and if his legitimate title to supreme power is disputed by a large section of his subjects, an attack made upon his life for the purpose of overthrowing his Government, has always been distinguished from the murder of a private individual for the sake of gain or revenge. Some may think such an act worse than murder; others may regard it as an heroic act of patriotism; but none would treat it as an ordinary act of homicide.* From the time when Harmodius and Aristogeiton, the slayers of Hipparchus, and Brutus, the expeller of the Tarquins, were honoured with statues, to that of the Jesuit Mariana, who taught that it was lawful to assassinate heretical Kings,† of the author of the celebrated tract which preached the assassination of Cromwell, and of Charlotte Corday, the slayer of Marat; such an attempt has always been judged as a daring and isolated act of rebellion, as well as an offence against the person of an individual. An absolute monarch bears in himself the concentrated majesty and authority of the Government, and it is in this capacity that the attack is made upon him. Any legislation therefore which seeks to confound this distinction, and to treat as an ordinary criminal a man who, with reference to the Government which he attacks, is guilty of rebellion and treason, rather than of simple murder, is likely to lead to unsatisfactory results. These remarks are illustrated and enforced by the recent case of Bernard. As has been already stated, Bernard was a Frenchman residing temporarily in England; and the real offence for which he was tried (as Lord Campbell informed the jury) was that of plotting against the life

* Concerning the Jacobite plots to assassinate William III., see Macaulay's *History of England*, vol. iv. pp. 285, 566, 648.

† See the extracts from his treatise, *De Rege et Regis Institutione*, in Bayle, *Dict.*, Art. *Mariana*, note G.

of the French Emperor.* Now the manner in which he was indicted at the Central Criminal Court was as follows:— Orsini, Pierri, Gomez, and Rudio, were charged as principals in the murder of Nicholas Battie, one of the French guards, who was among the escort of the Emperor at the theatre, and who was unintentionally killed by the explosion of the hand grenades. Bernard was charged as an accessory to the murder of this French soldier. An indictment framed in this circuitous manner upon a statute having a different object, and giving rise to numerous questions of law, was not likely to end in a conviction; and the course pursued created a false appearance of unfairness in the tribunal, when the fault really lay in the procedure.

It is, indeed, possible that an indictment against Bernard, under the common law, for a conspiracy to murder, would have been successful. It certainly would have been direct, instead of circuitous; and it would not have been liable to the grave legal doubts to which the proceeding under the Act of 9 Geo. 4. was subject. But it would, equally with the other mode of proceeding, have been involved in the difficulty of confounding a treasonable attempt against the life of a foreign sovereign with an ordinary conspiracy to commit a murder. No precedent exists for such an indictment; and as a homicide committed abroad would not be a murder at common law, there can be no certainty that it would be sustainable.

All attempts to exercise a criminal jurisdiction abroad on the territory of a civilized State are of questionable propriety; and even with respect to a homicide committed in a foreign civilized country by one Englishman upon another Englishman, it may be doubted whether it is expedient to try the offender by our tribunals. But

* When Bernard was brought before the Bow-street court, he was charged by the police with conspiring to assassinate the Emperor of the French; but he was committed by the magistrate for murder. The two offences were distinct both in law and fact.

whenever such a jurisdiction is attempted, its precise limits ought to be defined by clear legislation. If an Englishman is punished for a crime committed in a foreign civilized country, the main object seems to be to evince a friendly disposition towards that country; for it may be assumed that every civilized State can enforce its own criminal laws, and maintain order on its own territory, without foreign assistance. With respect to uncivilized countries, the local consular jurisdiction established under treaty is avowedly for the protection and benefit of the resident British subjects: among savages the criminal law of England is sometimes administered by colonial tribunals from motives of humanity, for their protection against English seafarers and marauders. According to the construction of 9 Geo. 4., as established by Reg. *v.* Azzopardi, an Englishman might be hanged at London for murdering a Frenchman at Paris or a negro at Timbuctoo. The enactment is limited to 'land out of the United Kingdom,' and therefore would not apply to a murder committed by a British subject in a foreign ship on the high seas.

With the exception of libels upon foreign sovereigns or magistrates, the state of the law of England respecting attempts hostile to foreign Governments is in the highest degree uncertain. Lord Lyndhurst has laid it down in debate, with the concurrence of other law lords, that a conspiracy in the United Kingdom, either by native subjects or aliens, to do any act, either here or abroad, which tends to embroil the Government of her Majesty with that of any foreign country, is a misdemeanour. This doctrine may be correct; but it has never been the foundation of any indictment; it has never been declared by any judicial decision, and it is not to be found in any text-book of criminal law. Whether this principle would ever be laid down as law by a judge to a jury, and whether a conviction could be obtained upon it, is at present only matter of conjecture. Even with respect to conspiracy to commit murder, the success of an indict-

ment for a misdemeanour at common law, where the homicide is committed or intended to be committed abroad, must be considered as wholly uncertain. If, therefore, a case similar to that of Bernard were at any time to occur, the Administration for the time would be placed in circumstances of great embarrassment. The discretionary power of sending aliens out of the country is now definitively extinct. The Alien Acts have expired, and will not be renewed; and the prerogative is so uncertain and undefined, that no Government could attempt to call it into action, even in extreme circumstances.* If conspiracies against foreign Sovereigns and foreign Governments are carried on in England under such circumstances as would be admitted to be a breach of international law, they can only be reached through judicial proceedings, and by punishment inflicted under the sentence of a criminal tribunal. Those judicial proceedings must be instituted, at a moment of public expectation and excitement, perhaps of party contest, under a law neither fixed by previous decisions, nor clearly defined by legislative enactment. The result is likely to be a failure of justice under circumstances creating a suspicion of the good faith of the Government, and therefore producing fresh irritation against this kingdom in the foreign country whose feelings and interests are primarily involved.

It may be suggested as a remedy for this state of things that the offence of embroiling the English Government with foreign Governments, by injurious publications against foreign sovereigns, or by conspiring against their persons or government, or by any similar act, should be reduced into a statutory form, as has been done in the parallel case of the Foreign Enlistment Act.

It is a mistake to suppose that an enactment of this

* See the elaborate article on the Alien Law of England, in the *Edinburgh Review*, vol. xlii. p. 99—174 (April, 1825), probably written by Mr. Allen.

sort would indicate weakness and a want of proper spirit; or would imply an undue deference to the demands of foreign Governments. Each State is a member of the great family of nations, and each has an interest in maintaining that national comity to which all States in their turn appeal, and from which all successively derive advantage. No nation, whatever its geographical position, can in this age of steamers, and railways, and electric telegraphs, maintain an isolated policy. A State is bound to observe the duties of good neighbourhood, and it cannot be said with truth that this country is not interested in removing by its legislation all reasonable grounds of offence on the part of foreign Governments, and to provide securities against acts which, by embroiling us with our neighbours, may endanger the maintenance of peace. It becomes a powerful and free State, like England, to offer an inviolable asylum to political refugees, who fly to her soil for security, and who use it merely for self-preservation. In affording this shelter, she may knowingly incur the risk of giving umbrage to powerful and valued allies; but her chivalrous performance of the duties of hospitality would not only degenerate into a Quixotic and romantic fanaticism, it would incur the blame of violating international obligations, if, when she possesses the power to prevent treasonable machinations against foreign Governments being carried on within her territory, she neglects to take proper means, consistent with her own constitutional forms and usages, for preventing this abuse of the right of international sanctuary.

The obligation incumbent upon a State of preventing her soil from being used as an arsenal in which the means of attack against a foreign Government may be collected and prepared for use, is wholly independent of the form and character of that Government. It is an obligation which every State owes to another, whether its institutions are free or despotic. An absolute monarchy is not less bound to observe this comity to a republic, or a republic to an

absolute monarchy, than one republic or absolute monarchy is bound to observe it to another.

On the other hand, it must be remembered that no corresponding law exists in any foreign State. Under the contemplated enactment, a British subject conspiring in England against the life of a foreign sovereign would be punishable by the sentence of an English criminal court. But if a Frenchman were to conspire in Paris against the life of the Queen of England, he would not be punishable under the French law. An alien who so conspired might be sent out of the country by the discretion of the French Government; but a native subject would be safe against all proceeding according to law. If, therefore, the British legislature were to pass such an enactment, they would show a greater deference for foreign Governments than the legislatures of foreign nations show to the British Government.

Professor Mohl, who has recently treated the subject of international asylum, in a learned and comprehensive spirit, recommends, as a practical solution, that the question should be referred to a Congress of the Powers of Western Europe.* It cannot, however, be expected that a Congress appointed to deliberate on this subject would lead to satisfactory results. Such a Congress would be incompetent to determine matters which would require the legislation of each State; and the circumstances of States differ too much for any form of extradition treaty to be universally or generally suitable. Countries differing in political institutions would require rules of extradition different from those fitted for countries resembling each other in political institutions. Countries divided from one another by long intervals of land, or by the sea, would require rules of extradition different from those fitted for countries adjacent to one another, and

* *Ib.* p. 600, 602.

especially for countries having a common land boundary. On the other hand, there is great truth in the remark of Professor Mohl, that the subject of international asylum. with respect both to its legal and political principles, is in an unsettled and confused state; and that a general agreement, founded upon a clear understanding of the question, cannot be arrived at without an active discussion conducted by persons examining it from different points of view. It is for the purpose of contributing to this discussion that the preceding pages are laid before the public. So long as the discordance of opinion which now prevails in this country on the questions above examined shall continue, all attempts at a solution by legislation will probably prove unsuccessful. No agreement exists as to the fundamental conditions of the problem. Conflicting opinions are held by eminent lawyers as to the state of the law, and by eminent statesmen as to the proper mode of amending it. Until the progress of discussion tends to some closer approximation of opinions, all practical combination for legislative action is unattainable. 'Contra principia negantem non est disputandum.' When the interval which separates opponents is so wide, there is no common ground on which they can meet. Much of the existing divergence of opinion may probably be attributed to the fragmentary and partial manner in which the subject has hitherto been brought under the attention of the public. It is, therefore, to be hoped that an attempt to treat the questions of foreign jurisdiction and of international asylum in connexion with each other, and to illustrate their mutual bearings, upon grounds of permanent policy, and without reference to any topic of ephemeral interest, may assist in removing the obstacles which now impede the practical consideration of a legislative remedy.

The time is not yet arrived when a revision of the law relating to this subject could be undertaken with advantage. The first step indeed would be to ascertain with precision what acts are rendered criminal by the existing

law. If the extent of the existing prohibitions, and the grounds of policy upon which they rest, were clearly determined, a considerable progress would be made towards a common understanding as to the expediency of further legislative enactments.

THE END.

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